84-938

No. _____

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ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

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Vol. I of III

QUESTIONS PRESENTED

1. Whether the F.R.Civ.P., Rule 41(b) dismissal of a civil action before trial, for petitioner-plaintiff's inability to lodge with the trial court a joint proposed pretrial order, stipulated to by the defendant prior to the pretrial conference heraing, constitutes the denial of access to the courts, the right to a trial on the merits, and to one's day in Court, and is a dismissal based on an unreasonable prior restraint on access to the courts in violations of Due Process of Law, under the Fifth Amendment, United States Constitution.

2. Whether the petitioner is entitled to proceed with a pretrial conference and to a trial on the merits, without respondent's consent, after lodging two extensive orders unilaterally, when defendant-respondent failed to supply its portion for the first and objected to procedural rights

reservations by petitioner in the second proposed draft. (See App. 71.)

3. Whether the trial judge is required to conduct a pretrial conference based on plaintiff's proposed orders containing his positions and thereafter issue a pretrial order pursuant to F.R.Civ.P., Rule 16 and try the case pursuant to same, and whether the district judge's failure to do so constitutes a per se, harmful, prejudicial denial of Due Process of Law under the Fifth Amendment, United States Constitution and is contrary to F.R.Civ.P., Rule 16.

4. Whether United States District Court for the Central District of California, Local Rule 9(g) (Civil), in effect in 1980 at the time of the dismissal of this action, providing "Not later than 5:00 p.m. on the Wednesday prior to the pre-trial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order,

approved as to form and substance by the attorneys for all parties appearing in the case. . .," is in this action a violation of Due Process of Law, and is contrary to F.R.Civ.P., Rule 16 providing that "the Court shall make an order which recites the action taken at the conference" requiring the trial judge to prepare an order based on what transpires at the pretrial conference. (Emphasis added.)

5. Whether U.S. District Court for Central District of California Local Rule 9(g) circumvented the obligations of a trial judge to conduct a pretrial conference and make a pretrial order at its conclusion pursuant to F.R.Civ.P., Rule 16.

6. Whether the Ninth Circuit decision in Buss v. Western Airlines, Inc., USCA 80-5818, approving the dismissal of a civil suit rather than proceeding to trial on petitioner's proposed pretrial conference

order is in conflict with the decisions of the Third Circuit in Titus v. Mercedes Benz of North America, 695 F.2d 746 (1982), the Fourth Circuit in McCargo v. Hendrick, 545 F.2d 393 (1976), and the Seventh Circuit in J. F. Edwards Construction Co. v. Anderson Safeway, 542 F.2d 1318 (1976), holding that a trial judge's order and a local rule requiring a plaintiff to assimilate the opposition's positions in a pretrial proposed order exceeded the District Court's jurisdiction under F.R.Civ.P., Rule 16.

7. Whether the pretrial dismissal pursuant to F.R.Civ.P., Rule 41(b), for the district judge's apparent dissatisfaction with petitioner's unilateral proposed pretrial order, without the trial judge in any way giving petitioner notice of what he considered deficient about same is contrary to F.R.Civ.P., Rule 16 and places

the Ninth Circuit in conflict with the Second Circuit in Padovani v. Bruchhausen, 293 F.2d 546 (1961), by permitting a dismissal for entirely unspecified deficiencies in petitioner's proposed pretrial conference order, without giving petitioner any notice or reasonable opportunity to comply with Court objections and instructions. (App. 71.)

8. Whether petitioner Buss was entitled to preserve court-ordered pretrial proceedings out-of-court by tape-recording or shorthand reporter, concerning which he was subjected to being sanctioned for alleged misconduct, pursuant to Title 28, U.S.C., Section 753 in order to file an independent certified record of what occurred in the pretrial process, for the trial and appellate courts to hear and consider.

Whether the trial judge exceeded his jurisdiction in issuing orders that

"Tape recording or other reproduction of meetings between counsel shall not be permitted;" filed July 3, 1980 (Doc. App. F,23) in regard to pretrial meetings and exchanges, and said order was plain error, and harmful, material, prejudicial denial of due process of law as guaranteed by the Fifth Amendment, United States Constitution and contrary to Title 28 U.S.C., Section 753.

9. Whether the district court's failure to enforce petitioner Buss's right to discovery of admissible evidence of damages and policy, pattern and practice information concerning age discrimination constitutes an unreasonable prior restraint on one's right to his day in court and to have access to the courts to have a trial on the merits with all evidence available to be heard, and this constitutes a denial of Due Process of Law under the Fifth Amendment, United States Constitution. (Hickman

v. Taylor, 329 U.S. 495, 516 91 L.Ed. 451, 465 (1947); Green v. McDonnell-Douglas, 411 U.S. 792, 804-805, 36 L.Ed.2d 668, 679, 93 S.Ct. 1817 and Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824.

10. Whether petitioner is entitled to obtain binding F.R.Civ.P., Rule 37 adjudications for defense failure to supply discovery, and he was denied access to these discovery remedies by virtue of non-consentual U.S. Magistrate referrals in violation of Article III, United States Constitution and the Fifth Amendment, United States Constitution. (Northern Pipeline Co. v. Marathon Pipe Line Co., 458 U.S. 50, 73 L.Ed.2d 598, 102 S.Ct. 2858.)

11. Whether solely an Article III District Court judge, not a U.S. Magistrate, has jurisdiction to issue F.R.Civ.P., Rule 37 sanctions of contempt, default and default judgments, adverse finding of fact,

partial summary judgment or adjudications, and to prevent the trial of a defense.

12. Whether the District Court Judges exceed their jurisdiction in delegating pretrial discovery, non-consentually, to a non-Article III U.S. Magistrate, and failing to hear same de novo.

13. Whether the non-consentual U.S. Magistrate referral of pretrial discovery matters in a civil case on evidentiary issues of what is relevant, privileged and admissible at the trial results in a constitutionally impermissible bifurcation of the trial issues concerning evidence which harmfully and prejudicially violate Article III, United States Constitution and the Due Process Clause of the Fifth Amendment, United States Constitution.

14. Whether a judgment of dismissal, wholly devoid of any findings of fact, and without any factual basis in the record,

jurisdictionally fails to provide a basis for an appellate court to evaluate whether the dismissal is fair, and the appellate court harmfully and prejudicially erred in failing to remand the matter for trial and proper factual findings that it could review (in violation of Due Process of Law, Fifth Amendment, U.S. Constitution). (Kelley v. Everglades Drainage District, 319 U.S. 415, 87 L.Ed. 1485.)

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No.

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

Comes now the petitioner, plaintiff and appellant Robert A. Buss and petitions this Honorable Court for a writ of certiorari, directed to the Honorable Terry J. Hatter, United States District Judge for the Central District of California, the

United States District Court for the Central District of California, and the United States Court of Appeals for the Ninth Circuit, (reversing a pretrial judgment of F.R.Civ.P., Rule 41(b) dismissal as a harmful, per se violation of due process of law as guaranteed by the Fifth Amendment, U.S. Constitution), and remanding the above matter for a jury trial on the merits of the action.

The trial judge refused to proceed with either of petitioner's two, extensive, unilateral proposed pretrial conference orders, demanding a joint one, stipulated to by the defendant, as a prerequisite to a trial on the merits.

When petitioner's inability to supply a joint, stipulated proposed pretrial conference order consented to by defendant continued, the trial judge dismissed the above matter, unnoticed at a status conference

pursuant to F.R.Civ.P., Rule 41(b), five weeks before a rescheduled pretrial confeeence hearing was set for hearing and about four weeks before a further draft was due, without competent evidence, and without permitting plaintiff's counsel to even present any oral response and without the court giving any instructions or orders as to how he wanted a pretrial conference order prepared so that plaintiff would know how to come into compliance.

JURISDICTION

Jurisdiction is conferred on this Court by Title 28, U.S.C., Sections 1255 and 2101(c) and Rules of the Supreme Court of the United States, Rules 17 and 20; Article III, United States Constitution and the Fifth, Sixth and Seventh Amendments, U.S. Constitution.

A copy of the opinion as issued by the United States Court of Appeals for the Ninth Circuit, filed on July 26, 1984, is attached hereto at Appendix "V".

A copy of the order denying petitioner Buss's petition for rehearing in the U.S. Court of Appeals for the Ninth Circuit, filed on September 13, 1984, is attached hereto at Appendix "W".

A copy of the order of dismissal by the trial in United States District Court for the Central District of California, the Honorable Terry J. Hatter, U.S. District Judge Presiding, entered October 2, 1980, is attached hereto at Appendix "R".

A copy of the denial of reconsideration of the order of dismissal by the trial court, entered October 23, 1980, is attached hereto and incorporated herein at Appendix "T".

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AND REGULATIONS INVOLVED

Article III, United States Constitution; Fifth, Sixth and Seventh Amendments, U.S. Constitution.

Title 28, U.S.C., Sections 636, 753, 1291; Title 29 U.S.C., Sections 621 et seq. through Section 632, constituting the Age Discrimination in Employment Act.

Federal Rules of Civil Procedure, Rules 16, 37, 41(b) and 83.

Local Civil Rules for the United States District Court for the Central District of California, Rule 9(g) as in effect during 1980, Rule 9 as amended during 1983 and presently in effect, current Local Rule 27.

Article III, Fifth and Seventh Amendments, U.S. Constitution; Federal Rules of Civil Procedure, Rules 16, 14(b) in pertinent

part, and 83; U.S. District Court for Central District of California, Local Rules 9(g) in effect during 1980, and Local Rules 9.8 and 27 presently in effect, are set forth in Appendices "X" through "FF," pages 325 through 334.

STATEMENT OF FACTS

Petitioner Robert A. Buss commenced an Age Discrimination in Employment action against the respondent Western Airlines, Inc., pursuant to Title 29 U.S.C., Section 621, et seq. on January 12, 1977, in the U.S. District Court for the Central District of California, entitled Robert A. Buss v. Western Airlines, Inc., U.S.D.C.(C.D.Cal.) CV-77-0124-LEW.

Petitioner Buss had been a Western Airlines executive, employed by the respondent for 35 years. He was Director, Ground

Flight Training for five years before his termination at the age of 62.

The action was first assigned to U.S. District Judge Laughlin E. Waters and then transferred to the U.S. District Judge Terry J. Hatter, Jr.

After an explosive, bitter discovery and pretrial battle between petitioner Buss and the respondent Western Airlines, Inc., the action was dismissed before trial on September 22, 1980, without prejudice at a status conference. It was dismissed on an oral application without notice and without any defense declarations under oath, after any applicable statute of limitations had expired, pursuant to F.R. Civ.P., Rule 41(b), when petitioner could not supply a joint, stipulated pretrial proposed order, co-signed by respondent's counsel.

The Court's stated grounds were that "plaintiff has failed to comply with the orders of this Court previously made; plaintiff has failed to diligently prosecute this action and has not contacted opposing counsel regarding the preparation of a proper Pre-trial Conference order since the previous hearing on August 11, 1980." (Doc. 353; App. 221.)

The dismissal ground of no "proper" Pre-trial conference order appears to refer to U.S. District Court Local Rule 9 requirement that it be a joint, stipulated document executed by all parties, which stipulation the respondent had refused to execute.

However, neither Judge Terry Hatter's dismissal order (Docket No. 353; App. 221) nor the Ninth Circuit appellate opinion contain a finding or statement of facts from which this Court could evaluate the fairness or erroneousness of the dismissal

order. (App. Q, p. 319.)

Petitioner had lodged two proposed pretrial orders prior to the first scheduled pretrial conference set for August 11, 1980. One contained petitioner Buss's position only, because the respondent had delivered nothing to insert into it. (Doc. 345.) The second one contained those segments sent by respondent's counsel. (Doc. 346; App. 71.) But defense counsel objected to petitioner's reservation of rights to continue discovery in light of respondent's failure to supply same, and he refused to co-sign the second one. (See affidavit of attorney Giannini, filed August 11, 1980, Docket No. 347; App. M, p. 174.)

U.S. District Judge Hatter did not express <u>any</u> criticism of the unilateral proposed pretrial conference order drafts, except that they were not stipulated to by the respondent Western Airlines. (See

transcripts of August 11, 1980 hearing, App. L., p. 160 and September 22, 1980, App. P, p. 191.)

The dismissal occurred despite the facts that no prior sanctions of any kind were issued against petitioner other than that petitioner Buss's counsel had taped a pretrial meeting. (Order, filed July 3, 1980; App. F, p. 24.) Petitioner timely appeared at all court proceedings and timely filed all papers both in the discovery and pretrial process.

Starting on August 4, 1980, Judge Hatter threatened to dismiss the action although he admitted he did not know what was interferring with the flow of the pretrial process, (see App. 41.) despite the fact that Judge Hatter admitted he had not listened to the tape of the June 18, 1980 meeting he had detained from June 30, 1980 through August 11, 1980. (App. U, p. 318;

App. G, p. 27.)

Petitioner Buss had initiated aggressive discovery of the liability and damages information he required in order to obtain a full, fair trial on the merits when the case could not be settled.

As with most employee-employer disputes, both the liability and damages phase evidence and information needed were for the most part solely controlled by and in the possession of the respondent Western Airlines, Inc. The petitioner Buss had virtually no other source from which to obtain the evidence needed to establish his case, but the respondent Western Airlines, Inc.

Petitioner Buss faced an unending barrage of defense initiated interferences with his obtaining the information and evidence he needed to try his case.

District Judge Waters characterized respondent Western Airlines' defense posture

as being like the Russians at Stalingrad, and on March 23, 1979 during a hearing, he described Western Airlines' refusals to supply discovery as follows:

> " . . . there has been a determined resistance on the part of the defendant in this case to produce nothing, to say nothing.
>
> "I think there has been a deliberate lack of cooperation and an attempt to frustrate this discovery procedure in this case by the defendant."
> (R.T. P. 20, line 21 - p. 21, line 1.)

Judge Waters went on in the same hearing on March 23, 1979 to call the respondent's patter of conduct "a deliberate and determined, intentional pattern of frustration of the discovery process." (R.T. p. 21, lines 3-5.)

U.S. District Court Judge Waters had referred the Buss case to a U.S. Magistrate with a specific prohibition on petitioner Buss being able to seek a District

Court adjudications on discovery matters that had been made by the U.S. Magistrate on July 24, 1978. (App. B, p. 5)

This U.S. Magistrate referral was non-consentual and pursuant to a general U.S. District court order of the Chief Judge that no U.S. Magistrate referral could be appealed or heard and considered by a U.S. District Judge. (See general order, dated January 31, 1978, in App. A, p. 1.)

This non-consentual U.S. Magistrate referral, contained the proviso that no review, hearing or determination could be obtained from an Article III, U.S. District Judge, and thus suspended petitioner's right to seek appellate review of any U.S. Magistrate determinations. (App. A, p. 3.)

At the time of the Buss U.S. Magistrate referral, the U.S. Court of Appeals for the N nth Circuit, in which the Central District of California is located, had

issued an opinion in U.S. v. Ritte, 558 F.2d 926 (1977) holding that Magistrate orders were not appealable or reviewable on appeal, and only U.S. District Court orders were.

Also, the U.S. Magistrate referral on June 12, 1978 and July 24, 1978 (App. B, p. 5) for all further discovery proceedings resulted in the extremely harmful and deletorious destruction of significant remedies petitioner Buss had to obtain discovery pursuant to F.R.Civ.P., Rules 26-37 and Hickman v. Taylor, 329 U.S. 451. It ipso facto prohibited petitioner Buss from seeking final adjudicatory remedies contained in F.R.Civ.P., Rule 37, because a U.S. Magistrate, not being an Article III federal judge, had no jurisdiction to enter final adjudications.

These F.R.Civ.P., Rule 37 discovery enforcement remedies petitioner Buss lost by the non-consentual U.S. Magistrate referral included contempt, financial sanctions against non-parties, the entry of a default and default judgment, adverse findings of fact and orders that the sanctioned party not be able to produce evidence of a defense. See F.R.Civ.P., Rule 37(b).

Between June 12, 1978 and July 24, 1978, when the anti-appeal, no final adjudicatory discovery remedies orders of Judge Waters were issued and about May 19, 1980, petitioner was entirely unable to obtain Article III district court, judicial discovery determinations.

Petitioner Buss applied to the U.S. Court of Appeals for the Ninth Circuit for

a writ of mandate and/or prohibition filed on or about September 29, 1978, to vacate the magistrate referral as violative of Article III and the Due Process Clause of the Fifth Amendment, United States Constitution. Two Ninth Circuit orders were filed and issued to the respondent District Court Judge in response to the writ, but they went unanswered. When the no review provisions were vacated, the writ was denied.

Twice after the non-appealability provisions were lifted, applications were made to Judge Waters, who remanded them to the U.S. Magistrate rather than entering substantive orders both times. (See Doc. 250, 270 and 271; App. E, p. 20.)

Petitioner had significant discovery production problems which required that he have the force and strength of F.R.Civ.P.,

Rule 37(b) remedies and the ability to seek appellate review of those areas of discovery not enforced.

These included his inability to obtain sufficient damages data to do an economic evaluation for trial which was ordered, but unenforced by the U.S. Magistrate, and the failure of the trial court to issue orders or for the defendant to voluntarily supply sufficient information to do a pattern and practice workup pursuant to McDonnell-Douglas v. Green, 411 U.S. 792, 36 L.Ed. 2d 688.

In petitioner's notice of taking a F.R.Civ.P., Rule 30(b)(6) Western Airlines representative's deposition, filed July 18, 1978 (Doc. 80, p. 3) petitioner Buss scheduled the obtaining of loss of earnings damages discover as follows:

> "8. What the salaries of all corporate officers, directors, executive personnel have been

during the years of 1974, 1975, 1976, 1977, 1978, as well as bonuses, benefits, pension plans, insurance agreements for those with Western Airlines, Inc., in said capacities."

In his August 17, 1978 discovery order, the U.S. Magistrate ordered that the earnings information on petitioner's successors be supplied by the respondent Western Airlines, Inc., as follows:

"(2) Defendant's motion to limit the persons to be produced and the scope of the depositions to be conducted pursuant to plaintiff's notice of taking depositions dated July 14 (sic), 1978 is:

* * * * * *

"(g) Granted as to paragraph 8, except defendant is to produce the information requested in writing as to the person or persons who replaced Mr. Buss after he was placed on furlough, including their seniority;" (Doc. 120, p. 2, lines 17-20.)

The respondent gave such entirely incomplete information as a consequence of the August 17, 1978 orders for damages

discovery and refused to complete it that petitioner could not obtain a meaningful economic evaluation as his economist stated. (App. O, 179.) Petitioner had to go back to court repeatedly attempting to get enough information to do his economic evaluation of damages but he never succeeded in enforcing his right to this essential discovery. (App. D, p. 10; App. O, pp. 179, 190.)

Petitioner made several applications attempting to obtain orders for sanctions for non-production of sufficient damages information. (App. D, p. 10; App. K, pp. 91-95, 105, 106, 127, 135.)

The only recourses petitioner had as a result of the failure of the District Court to enforce this damages discover were to have his economic expert attend the trial of the case and testify based on the testimony at trial and to seek appellate

review. The situation meant that petitioner's hands were tied by the respondent's failure to give damages discovery which necessarily could not be inserted in a proposed pretrial document.

In order to establish the necessary element of "intent" and to establish wilfulness for the purposes of double damages in Age Discrimination in Employment suits, under 29 U.S.C., Section 626, petitioner found it to be necessary to his case to obtain a pattern and practice workup. The U.S. Magistrate at first did not order any information and then after a hearing on June 25, 1979 in which Judge Waters ordered for augmentary information.

Petitioner Buss's applications for reconsideration of the U.S. Magistrate's discovery orders and final adjudicatory determinations had been filed on May 25, 1979 (Doc. 215), June 29, 1979 (Doc. 219)

and on July 10, 1979 (Doc. 225), and the pre-hearing stipulations filed on August 15, 1979. (Doc. 242)

The respondent Western Airlines produced computer printouts which in their photocopied form were blurred, illegible and entirely too incomplete to be used for an age discrimination pattern and practice workup. Finally, counsel admitted at the June 25, 1979 hearing before Judge Waters that the materials containing the information for the pattern and practice workup were not computerized and had to be hand-processed.

But in a December 17, 1979 hearing before Judge Waters, petitioner repeated attempts to enforce discovery, and the following exchange occurred between the Judge and counsel concerning the August 15, 1979 discovery pre-hearing stipulation

of issues:

> "THE COURT: . . . I am going to refer that back to the Magistrate with the requirement that the 306 be placed in proper form.
>
> I am going to order the Magistrate to rule on only one subject at a time, and then as soon as he has ruled, then that matter is to be immediately referred to me. . .
>
> MS. LAVINE: Very well.
>
> Your Honor, I at this time move that you rule on those matters which cannot be heard by a Magistrate, and that your motion for reconsideration be granted or denied.
>
> THE COURT: All other matters are referred back to the Magistrate.
>
> MS. LAVINE: You decline to rule on the motions for reconsideration?
>
> THE COURT: You've got my order."

When Judge Hatter across the board denied all of petitioner Buss's discovery applications which included his applications for pattern and practice workup information, damages information and the

home locations of witnesses, petitioner applied to the U.S. Court of Appeals for the Ninth Circuit for a writ of prohibition and/or mandate to enforce the discovery in Buss v. Western Airlines, Inc., U.S.C.A. 80-7287, which was denied without opinion, on June 16, 1980.

Throughout the proceedings, and particularly in regard to the pretrial process, petitioner timely appeared at all of the scheduled proceedings in court, and timely filed all of the required pretrial documents. They included a witness and exhibit list, due 40 days before the pretrial, although the respondent Western Airlines entirely failed to file one at all (Doc. 307, filed May 14, 1980), a memorandum of contentions of law and fact (Doc. 340) and two proposed drafts of pretrial conference orders (Doc. 345, filed August 5, 1980 and Doc. 346, filed August 7, 1980).

Respondent's counsel engaged petitioner's counsel in bitter personal attacks during the spring and summer of 1980, forcing her to process and appeal to protect herself professionally and which was inordinately time consuming. This involved petitioner's counsel having taped the pretrial hearings. (App. F, p. 23)

Petitioner was unable to obtain drafts of the proposed pretrial order, co-signed by respondent's counsel, which local rules required to be prepared jointly prior to the pretrial conference rather than afterwards or based on the trial judge's orders as to what was to be put into same.

The second draft of the proposed pretrial conference order (Doc. 346) is attached hereto at App. K, p. 71) and the affidavit of defense counsel Paul L. Giannini, filed August 11, 1980 stating that he objected to the reservation of discovery rights of

petitioner as his sole reason for not co-signing the document in order to make it a "proper" proposed pretrial conference order. (See dismissal order, entered October 3, 1980, App. R, p. 221).

Petitioner Buss's counsel Joan Lavine tape-recorded a June 18, 1980 pre-trial conference meeting and attempted to preserve others. She had done so pursuant U.S. Magistrate orders, filed August 17, 1978 (Doc. 120, pp. 2-3).

On June 30, 1980, Judge Hatter issued a conditional sanction order for Ms. Lavine having taped a court-ordered pretrial meeting on June 18, 1980 despite the U.S. Magistrate's order (Doc. 120), requiring that the tape be deposited with him by the next day, which petitioner's counsel did on June 30, 1980. (See receipt, Doc. 336, filed July 22, 1980; App. G, p. 27)

Judge Hatter personally detained the tape of the June 18, 1980 pretrial meeting until August 11, 1980, the date of the pretrial, so that it could not be used by the petitioner to transcribe respondent's position for the proposed document or be used to establish what the respondent had agreed to have put in the proposed pretrial order. (App. G, p. 27.)

Also, Judge Hatter issued an order, filed July 3, 1980, entirely preventing the use of exchanges at any pretrial meetings. It stated in part:

> "Tape recording or other reproduction of meetings between counsel shall not be permitted." (Doc. 327; App. R, p. 23.)

Petitioner's counsel had no means of preparing pretrial documents that were required to be based on exchanges taking place at court ordered meetings, as a result of the above order.

Petitioner Buss once again petitioned the U.S. Court of Appeals for the Ninth Circuit for a writ of prohibition and/or mandate to permit him to tape or otherwise be able to take down through a shorthand reporter or stenographer the pretrial proceedings in Buss v. Western Airlines, Inc., U.S.C.A. 80-7364. That application was denied. (App. H, p. 29.)

At an August 4, 1970 hearing before Judge Hatter, Judge Hatter stated that he did not know why the pretrial process had not been completed, but that he would dismiss the action if it were not, in denying defense counsel's application for a continuance. (See App. J, p. 41.)

Respondent's counsel specified that his inability to work on the Buss pretrial drafting was due to his being court-ordered by Judge Hatter to attend proceedings during the week of August 4, 1980 in another

discrimination action before Judge Hatter, EEOC v. Western Airlines. (Doc. 347, p. 2; App. M, p. 175; transcript of August 4, 1980 hearing, attached at App. J, p. 41.)

At the August 11, 1980 hearing the trial judge continued the pretrial conference to October 27, 1980, with a status conference, scheduled for September 22, 1980. (Minute order, August 11, 1980, Doc. 352; App. N, p. 178a.) It stated in part:

> "Pltf to be ready for PTC on 10/27 or action will be dismissed unless good cause is shown."

At the status conference on September 22, 1980, Judge Hatter dismissed the case without giving petitioner any opportunity at all to respond to defense counsel's claim that no work was being done on the case. (September 22, 1980 transcript; App. P, p. 191.) Defense counsel's claim was false. (Doc. p. 353, 361.)

U.S. Court of Appeals for the Ninth Circuit affirmed petitioner's appeal on July 26, 1984. The Ninth Circuit did not address petitioner's right to discovery, to present triable issues for adjudication without undue coersion in the pretrial process, the non-consentual discovery referral to a U.S. Magistrate and Article III violations or the lack of findings in the dismissal order, omitting an appellate statement of facts.

ARGUMENT

I

THE TRIAL COURT'S F.R.CIV.P., RULE 41(b) DISMISSAL OF THE BUSS MATTER, ON AN ORAL, UNNOTICED APPLICATION, WITHOUT EVIDENCE, DUE TO PETITIONER"S INABILITY TO OBTAIN FROM RESPONDENT A JOINT, STIPULATED, PROPOSED PRETRIAL CONFERENCE ORDER TO LODGE PRIOR TO A PRETRIAL CONFERENCE, CONSTITUTES THE DENIAL OF ANY MEANINGFUL, EQUAL ACCESS TO THE COURTS IN VIOLATION OF DUE PROCESS OF LAW AS GUARANTEED BY THE FIFTH AMENDMENT, U.S. CONSTITUTION, AND EXCEEDS THE TRIAL JUDGE'S JURISDICTION UNDER F.R. CIV.P., RULE 16.

Your petitioner Robert A. Buss has suffered the outrage of an unreasonable, arbitrary dismissal of his action, without trial, as a direct and immediate result of

respondent's failure to cooperate in finishing and executing a proposed, joint, pretrial conference order when petitioner insisted on pursuing damages and pattern and practice discovery. (App. K, p. 71, App. M, 174)

Petitioner Buss has been punished for respondent's wrong-doing that resulted in petitioner's inability to supply his opposition's signature and position to present in a proposed joint document for refusing to make damages and pattern and practice discovery. (Societe Internationale v. Rogers, 357 U.S. 197, 2 L.Ed.2d 1255, 78 S.C.t. 1087).

United States District Court for the Central District of California, Local Rule (Civil) 9(g) requiring a joint, stupulated pretrial conference statement to be filed prior to a pretrial conference hearing impermissibly placed in the hands of the opposition the arbitrary power to withhold

consent for a trial. Such a rule has no legal basis in F.R.Civ.P., Rule 16 and is an impermissible, prior, arbitrary restraint on a party's right to trial in violation of Due Process of Law, Fifth Amendment, United States Constitution. (Boddie v. Connecticut, 401 U.S. 371, 28 L.Ed.2d 113, 91 S.Ct. 780.)

In the face of disputes over the proposed pretrial order, petitioner Buss was entitled to have those disputes over damages and pattern and practice issues adjudicated by the district judge in F.R. Civ.P., Rule 16 proceedings. It was the responsibility of the trial judge to dictate the pretrial order (McCargo v. Henrick, 545 F.2d 393, 401 (4th Cir. 1976), telling counsel what he wanted in it at a pretrial conference hearing if he chose to have it completed by counsel.

Petitioner Buss was not only not accorded a just, fair, impartial hearing or determination on either his age discrimination suit on its merits or on the charge that he had not prepared a "proper" proposed pretrial conference order.

He was not accorded the right or opportunity for any hearing at all.

The respondent's counsel, at a status conference on September 22, 1980, five weeks before the scheduled October 27, 1980 pretrial conference, moved orally to dismiss, arguing inaccurately that he had not been contacted since the prior proceeding on August 11, 1980.

No legal evidence was introduced by respondent Western Airlines that petitioner Buss had failed to comply with any valid court order or local rule to the best of his ability, nor was the petitioner given any opportunity whatsoever to respond by

meeting opposing evidence, or to oppose with evidence or argument prior to the dismissal. (Gregory v. Chicago, 394 U.S. 11, 22 L.Ed.2d 134, 89 S.Ct. 946; Thompson v. City of Louisville, 362 U.S. 199, 4 L.Ed.2d 654, 80 S.Ct. 624; Estate of Buchman, 123 Cal.App.2d 546; Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897); Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981); Mathews v. Eldridge, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976); Mott v. MacMahon, 214 F.Supp. 20 (N.D.Cal. 1963); Gonzi v. Superior Court, 51 Cal.2d 586, 355 P.2d 97; Chapman v. California, 386 U.S. 18).

Argument impermissibly became evidence herein.

To judge in a contested proceeding implies the hearing of legal evidence from both sides in open court, a comparison of the merits of the evidence of each side,

a conclusion from the evidence of where the truth lies, application of the appropriate laws to the facts found, and the rendition. These due and regular procedures are wholly absent from the Buss matter. (Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841 (1897))

Like respondent's motion to dismiss, the defense-drafted dismissal order and the appellate opinion are totally empty of a statement of facts or findings of fact for this court to use to evaluate the reasons for the dismissal in order to determine their fairness and erroneousness. (Kelly v. Everglades Drainage District, 319 U.S. 415, 87 L.Ed. 1485; Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 805 (1967))

II

THE BUSS V. WESTERN AIRLINES, INC. DECISION PLACES THE NINTH CIRCUIT IN CONFLICT WITH THE U.S. SUPREME COURT IN SOCIETE INTERNATIONALE V. ROGERS, 357 U.S. 197, AND THE THIRD FOURTH AND SEVENTH CIRCUITS WHICH HAVE HELD THAT THE DISTRICT COURT EXCEEDS ITS JURISDICTION UNDER F.R.CIV.P., RULE 16 BY PLACING THE ENTIRE BURDEN ON A PLAINTIFF TO OBTAIN STIPULATED, COMPLETE PRE-TRIAL ORDERS, CONTAINING UNREASONABLE REQUIREMENTS THAT A PLAINTIFF IS UNABLE TO SATISFY, FOR A JUDGE TO EXECUTE ON PAID OF DISMISSAL.

U.S.D.C., (C.D.Cal.) Local Rule 9(g)

providing that

> "Not later than 5:00 p.m. on the Wednesday prior to the pretrial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order, approved as to form and substance by the attorneys for all the parties appearing in the case . . ."

is inherently and as construed and applied, a violation of Due Process of Law, Fifth Amendment, United States Constitution.

A trial judge exceeds his jurisdiction in attempting to exact unreasonable requirements from a plaintiff in the preparation of a pretrial order as in Local Rule 9(g). Here, petitioner Buss was required to have lodged a joint pretrial order completed by respondent before a pretrial conference had taken place that met the trial judge's unarticulated specifications, an obvious physical impossibility. Could anything have been more unreasonable?

Petitioner was also required to have obtained defense counsel's stipulation and signature on a proposed draft of the pretrial before the pretrial hearing.

During 1980, U.S. Dist. Ct. (C.D.Cal.) (Civil) Local Rule 9 did not in any way take into consideration or provide for an adjudication and remedy for culpable misconduct by the defendant in failing to cooperate to complete the pretrial documents.

Since the dismissal of the Buss matter, Local Rule 9(g) has been amended to require that all the parties cooperate and execute the pretrial proposed document on a timely basis.

Further, petitioner's proposed sanction of entry of a default against a culpable defendant for failure to cooperate has been codified in the U.S. District Court for Central District of California, Local Rule 27 (1983), and recognized as an appropriate analogous remedy for a plaintiff for a defendant's failure to respond with needed discovery. (Hritz v. Woma Corp., 732 F.2d 1178 (7th Cir., 1984.))

In the case at bar, the trial court's dismissal order did not in any way specify any culpable conduct on petitioner's part for his inability to obtain a joint statement, co-signed by the respondent's counsel. (Societe International v. Rogers, 357 U.S.

197, 212, 2 L.Ed.2d 1255, 1265, 78 S.Ct. 1087 (1958).)

This Court said in Societe Internationale v. Rogers, 357 U.S. at 209, 2 L.Ed.2d at 1265, that provisions for dismissal of a complaint must be read in light of the Fifth Amendment that no person shall be deprived of property without due process of law, and more particularly against the opinions of this court in Hovey v. Elliott, 167 U.S. 409, 42 L.Ed. 215, 17 S.Ct. 841, and Hammond Packing Co. v. Arkansas, 212 U.S. 322, 53 L.Ed. 530, 23 S.Ct. 370.

Neither the trial court nor the appellate court addressed your petitioner's inability to go any further in adding anything more to the proposed pretrial order due to the respondent's failure to supply discovery and the trial judge's failure to adjudicate the disputed aspects

of the proposed pretrial order. (App. K, p. 71.) These facts cannot in any way be characterized as "willfulness, bad faith, or fault of petitioner" (Societe Internationale v. Rogers, 357 U.S. at 212, 2 L.Ed.2d at 1267) or as constitutionally sound bases for dismissal of an action without trial on the merits.

In Padovani v. Bruchhausen, 293 F.2d 546, the Second Circuit reversed the dismissal of an action when plaintiff was unable to produce a pretrial order draft that satisfied the trial court. The Second Circuit U.S. Court of Appeals said at 293 F.2d at 549:

> ". . .And where special pleading is emphasized that it remains uncertain what is demanded; here after four tries by defense counsel and the court, it is still unclear what it is thought the plaintiff must do to limit the case he has pleaded."

In the Padovani case, supra, 293 F.2d at 547, the court described the trial court's dismissal order:

> "The order is sweeping in its mandate. It is based upon specific findings that plaintiff's three successive pre-trial statements 'have failed to comply with notices and this Court's prior rulings' and that 'Plaintiff has been afforded more than ample opportunity to meet the prescribed requirements;'"

The Second Circuit found the trial judge's orders to be too indefinite and imprecise for compliance, in reversing the dismissal.

In the case at bar, petitioner was given absolutely no directions at all on how he was to redraft or change his pre-trial conference order draft to satisfy the trial judge. (App. L, p. 160)

In Identiseal Corporation of Wisconsin v. Positive Identification Systems, Inc., 560 F.2d 298, at 302 (7th Cir., 1977), the Court stated:

"We have recently decided a case in which we made clear that there are limitations on the district court's power at the pretrial conference. In J. F. Edwards Construction Co. v. Anderson Safeway Guard Rail Corp., 542 F.2d 1318 (7th Cir., 1976) (per curiam), we held that a district court lacks authority under Rule 16 to dismiss an action because one of the parties would not agree to a stipulation of facts. We noted that Rule 16 is noncoercive in nature, and we concluded that a dismissal based on a party's refusal to follow the trial judge's wishes expressed at the pretrial conference could only be upheld if that refusal could be characterized as a 'failure to prosecute.' Because the party that would not agree to the stipulation of facts was clearly not attempting to avoid trial, the district court's order could not stand."

In the case at bar, respondent disputed petitioner's reservation of rights to conduct damages and pattern and practice discovery, and use it at trial, as contained in the second draft of the proposed pretrial conference order.

The Third Circuit has articulated its position that unreasonable requirements made by a trial judge are in excess of his jurisdiction in Titus v. Mercedes Benz of North America, 695 F.2d 746, at 752 (3rd Cir., 1982):

> "On March 11, 1981, appropriately six weeks after the complaint was filed, the magistrate issued a six-page notice, announcing a series of elaborate, burdensome, and largely wasteful steps that the parties would have to undertake in preparation for trial. . .
>
> * * * * * *
>
> It should be noted that similar local rules have been struck down in other circuits as violative of F.R.Civ.P., Rule 16. J. F. Edwards Construction Co. v. Anderson Safeway, et al., 542 F.2d 1318 (7th Cir. 1976); Identiseal Cor. of Wisconsin v. Positive identification Systems, Inc., 560 F.2d 298 (7th Cir. 1977); McCargo v. Hendrick, 545 F.2d 393 (4th Cir. 1976).
>
> * * * * * *
>
> It is the failure of plaintiff's counsel to render full and timely compliance with the requirement, set forth in the magistrate's notice, that plaintiff's counsel must be the

primary responsibility for preparing an elaborate final pretrial order that caused the dismissal of the action. In my view, dismissal for that reason can be justified only if the requirement was reasonable. While a district court must be accorded broad discretion in managing its calendar, that principle does not shield from appellate review utterly unreasonable and counter-productive "make-work" requirements which serve no valid case-management goal.

In McCargo v. Hedrick, 545 F.2d 393, at 401 (4th Cir. 1976), the Fourth Circuit stated:

". . .Rule 16 was never meant to make lawyers try a case on paper instead of in a courtroom. In fact, it contemplates that the district judge himself will dictate the pretrial order. . ."

The reporter of the Supreme Court's Advisory Committee on the Rules of Civil Procedure has written:

"So the proper function of pre-trial is not to club the parties--or one of them--into submission. Rather the function is to see that the parties and the court are fully acquainted with the case, leaving no room

for the tactic of surprise attack or defense, and to uncover and record the points of agreement between the parties--all to the end of shortening and simplifying the eventual trial. Note the emphasis of Rule 16 upon 'the agreement made by the parties as to any of the matters considered;' there is here no basis for forcing the parties to replead or restate their legal propositions in terms more limited than the issues framed by the pleadings. . ."

III

THE COURT ORDER PROHIBITING PRESERVATION OF THE PRETRIAL PROCESS BY TAPE RECORDING OR CERTIFIED SHORTHAND REPORTER WAS PER SE, HARMFULLY, PREJUDICIALLY VIOLATIVE OF DUE PROCESS OF LAW. IT DENIED PETITIONER THE MEANINGFUL OPPORTUNITY TO INTRODUCE INTO EVIDENCE PROBATIVE, OBJECTIVE EVIDENCE TO OPPOSE THE F.R.CIV.P., RULE 41(b) DISMISSAL MOTION.

Petitioner Buss was denied the meaningful opportunity to be heard by prohibiting him from preserving and introducing into

evidence what had occurred in the pretrial process in violation of the Fifth Amendment, United States Constitution. (Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981).)

When extreme disputes occurred over the flow of the pretrial process, petitioner's counsel taped one meeting on June 18, 1980, and attempted to have a reporter take down another to preserve the truth about what had occurred and to use to prepare a proposed pretrial order. (A duplicate tape of the June 18, 1980 meeting is attached to a motion filed in the U.S. Court of Appeals for the Ninth Circuit, on June 19, 1984.)

On June 30, 1980, Judge Hatter demanded that the June 18, 1980 meeting tape be surrendered to him. He detained it from June 30, 1980 until August 11, 1980, preventing petitioner from using it to prepare

a proposed pretrial conference order. (App. G, p. 27)

On July 3, 1980 Judge Hatter further issued an order in pertinent part:

> "Tape recording or other reproduction of meetings between counsel shall not be permitted; . . ." (Doc. 327, p. 2)

The first trial Judge and the U.S. Magistrate had both issued orders that permitted preservation of all proceedings and meetings.

On August 4, 1980, Judge Hatter admitted he did not know what the source of the friction was concerning the pretrial. He further later admitted not listening to the June 18, 1980 meeting tape. (App. U, p. 318)

In Little v. Streater, 452 U.S. 1, 68 L.Ed.2d 627, 101 S.Ct. 2202 (1981), this Court held that where an accused putative father was denied the right to have HLA blood testing performed in order to

establish scientifically, reliability and objectively whether he was the father of a child, such a denial of the opportunity to collect, preserve and introduce into evidence the test results is a denial of due process of law and equal access to the courts.

In In re Martin, 58 Cal.2d 509, 512-513, 24 Cal.Rptr. 833, 374 P.2d 801, the California Supreme Court held that where the authorities withheld consent and regulations prohibited a defendant from obtaining a blood alcohol test to establish whether he was intoxicated so that he could produce probative, material evidence to establish his innocence, he was denied due process of law.

In Internal Revenue Service tax audits, the taxpayer is entitled to have the audit tape recorded or taken down by a shorthand reporter in order to establish a record.

U.S.A. v. Huene (9th Cir., 1984); Mott v. McMahon, 214 F.Supp. 20, 22 (N.D.Cal. 1963); 1 Audit CCH Internal Revenue Manual, ch. 4245.

The California Supreme Court ordered that a shorthand reporter be present at either party's request when a party's physical examination was required by court order and the examination was subject to further proceedings in the case of Gonzi v. Superior Court, 51 Cal.2d 586, 589-90, 335 P.2d 97 (1959).

Your petitioner is in an analogous position to that of the petitioners in the Little, Martin and Gonzi matters. In the case at bar, Mr. Buss was denied the opportunity to preserve a record of the pretrial process that was in such heated dispute in order to present probative evidence in court, when the respondent accused him of not cooperating in the

pretrial process.

As a result of the trial Judge's order, this court is left without an objective certified record and competent evidence to review.

In Griffin v. Illinois, 351 U.S. 12, 19, 100 L.Ed. 891, 899, 76 S.Ct. 585 (1956), this Court held that an indigent is entitled to a reporter's transcript on appeal in order to be effectively heard and to have effective access to the appellate courts and effective aid of counsel.

By denying your petitioner Buss the opportunity to have the record preserved, the trial court and respondent denied petitioner the effective access to the appellate court just as the petitioner in Griffin v. Illinois was denied access.

Title 28, U.S.C., Section 753 requires that proceedings in all federal courts be taken down by tape recording or shorthand

reporter.

If the pretrial process was a "proceeding" concerning which a litigant could be sanctioned, petitioner respectfully submits that he is entitled to have it treated as a "proceeding" for the purposes of preserving his rights to a reviewable record concerning those sanctions.

Without an accurate and complete record of the pretrial process, requested by petitioner, no court has had the whole record before it to evaluate.

IV

THE FAILURE TO ENFORCE PETITIONER'S RIGHTS TO DISCOVERY OF ADMISSIBLE PATTERN AND PRACTICE EVIDENCE ON THE ISSUES OF INTENT AND ADMISSIBLE DAMAGES EVIDENCE CONSTITUTES HARMFUL, PREJUDICIAL DENIAL OF DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT, U.S. CONSTITUTION.

Your petitioner Buss persistently and repeatedly sought the enforcement of

pattern and practice and damages discovery. (See App. 10, 48, 50, 106, 179.)

He was unsuccessful in obtaining meaningful discovery despite grudging admissions that he was entitled to same. (See Reporter's Transcript of June 25, 1979 hearing before Judge Waters.)

His F.R.Civ.P., Rule 37 discovery applications for final adverse rulings against the respondent were ignored and pending for extended periods of time from mid-summer, 1979 through the spring of 1980 before being denied by Judge Hatter summarily.

In Hickman v. Taylor, 329 U.S. 495, at 515, 91 L.Ed. 451, Justice Jackson said in a concurring opinion:

> "It seems clear and long has been recognized that discovery should provide a party access to anything that is evidence in his case. CF. Report of Commission on the Administration of Justice in New York State (1934) 41-42."

But what good is a lawsuit in which petitioner can prove liability, but is not given discovery of admissible evidence of his damages, as occurred here?

It is with the petitioner's inability to enforce discovery through the remedies provided for by F.R.Civ.P., Rule 37 due to the U.S. Magistrate referral and the lack of authority in the U.S. Magistrate, who was not able to make Article III, final adjudications, that the process broke down and the respondent was able to effectively thwart both discovery and the pretrial process. (U.S. V. Ritte, 558 F.2d 926 (9th Cir. 1977.)

V

A MAGISTRATE HAS NO JURISDICTION TO MAKE EVIDENTIARY DETERMINATIONS FOR AND CONCERNING TRIAL OR FINAL ADJUDICATIONS, BECAUSE HE IS NOT AN ARTICLE III JUDGE AND IS NOT THE UNITED STATES DISTRICT JUDGE HEARING THE TRIAL OF THE CIVIL ACTION. HIS DETERMINATIONS CONCERNING DISCOVERY MATTERS ARE ACTUALLY DETERMINATIONS OF WHAT THE ISSUES ARE IN THE CASE AND EVIDENTIARY RULINGS, PARTICULARLY ON WHAT IS RELEVANT AND PRIVILEGED, AT TRIAL, WHICH HE HAS NO JURISDICTION TO MAKE, AND CONSTITUTE A BIFURCATED TRIAL WHICH IS UNCONSTITUTIONAL. A U.S. MAGISTRATE HAS NO JURISDICTION TO ENTER FINAL DISCOVERY ORDERS UNDER F.R.CIV.P., RULE 37. FOR THESE REASONS TITLE 28 U.S.C., SECTION 636(b) AND THE ORDERS OF JUDGE WATERS, DATED JULY 5, 1978, JULY 24, 1978, AND DECEMBER 20, 1979, ARE INHERENTLY AND AS CONSTRUED AND APPLIED A VIOLATION OF DUE PROCESS OF LAW AND THE RIGHT TO A FULL AND FAIR JURY TRIAL AS GUARANTEED BY ARTICLE III AND THE FIFTH, SIXTH AND SEVENTH AMENDMENTS, U.S. CONSTITUTION. (TRO, INC. V. McMILLEN, 460 F.2d 348; NORTHERN PIPELINE CONSTRUCTION CO. V. MARATHON PIPE LINE CO., 458 U.S. 550, 73 L.ED. 2D 598, 102 S.CT. 2858.

In TRO, Inc. v. McMillen, 460 F.2d 348, in vacating a district court judge's order

referring a case to a magistrate and directing the district court judge to hear and determine various matters, the United States Court of Appeals for the Seventh Circuit made the following comments, to-wit:

> ". . .Constitutional Concern
>
> From the outset of the preliminary hearings and throughout the period until the act (Title 28 U.S.C., Section 636) was passed, there was an abiding concern by interested witnesses before the committees considering the various proposed bills, and by senators and representatives that expland-ing the jurisdiction of commissioners or magistrates might violate the dual constitutional concempts (1) that Article II of the Constitution vests the judicial power of the United States in judges possessing life tenure and undiminishable salaries and (2) that due process of law encompasses the right of litigants to have "cases" and "controversies" determined by Article III judges." (Footnotes omitted.)

A magistrate is not an Article III Judge any more than a bankruptcy judge is.

(Northern Pipeline Construction Co. v. Marathon Pipe Line Co., 458 U. S. 550, 73 L.Ed.2d 598, 102 S.Ct. 2858 (1982)).

Pretrial discovery determinations commence the shaping of factual determinations as to the issues of what is relevant and privileged in the actual trial of the facts. The United States Supreme Court has stated in its famous and basic case of Hickman v. Taylor, 329 U.S. 495, 91 L.Ed. 451, that what is evidence at trial is discoverable. It is in making the determination as to what is evidence that trial-type decisions on relevancy and privilege are made. It is this counsel's contention that only the Article III Judge assigned to hear the case may make those determinations.

What occurs if there is a magistrate referral is a bifurcation of the trial issues on what is evidence at trial. Particularly where the plaintiff here had

objected to these magistrate referrals and had run writs vigorously objecting to them, the magistrate referrals were clearly not consented to in any way.

Also, it is respectfully submitted that the trial judges in repeatedly referring this matter to a magistrate for F.R.Civ.P., Rule 37 adjudication, and refusing to enter orders de novo on the pretrial discovery matters raising final adjudicatory issues, were clearly erroneous, failed to exercise their authority when required to do so, these failures to make de novo determinations constituted prejudicial misconduct by the involved judges, and denied the petitioner Buss the right to due process of law and hearings on the merits of his claims by an Article III Judge under Article III and the Fifth Amendment, U.S. Constitution, and the trial judges lacked jurisdiction to act as they

did in making pretrial discovery motion referrals that were non-consentual. (See U.S. v. Roddatz, 447 U.S. 667, 65 L.Ed.2d 424, 100 S.Ct. 2406 (1980); Mathews v. Weber, 423 U.S. 261, 271, 46 L.Ed.2d 483, 96 S.Ct. 549 (1976).)

This is clearly a private dispute case, in which the right to a jury trial has been Congressionally authorized.

A U.S. Magistrate has no jurisdiction when assigned non-consentually to discovery matters, to enter final adjudications under F.R.Civ.P., Rule 37. These remedies include contempt, summary judgment, findings of fact adverse to a party, entry of defaults and default judgments.

Nevertheless, petitioner was forced by this unconstitutional U.S. Magistrate referral to run an Alice in Wonderland race in which he could never advance his position in order to be prepared for trial

by the referral. It is noted that the respondent did not at any time submit itself to the jurisdiction of the U.S. Magistrate, making any proceedings before him sham. (Pacemaker Diagnostic Clinic of America v. Instromedix, 712 F.2d 1308 (9th Cir., 1983), 725 F.2d 551 (9th Cir., 1984); U.S. v. Ritte, 558 F.2d 926 (9th Cir. 1977.)

VI

PETITIONER MOVES THAT THIS MATTER BE REMANDED TO THE TRIAL COURT TO MAKE PROPER ADJUDICATIONS ON THE ISSUES PRESENTED BY PETITIONER, INCLUDING A JURY TRIAL ON THE MERITS, PURSUANT TO TITLE 28, SECTION 2106, IN LIGHT OF THE TRIAL COURT'S FAILURE TO MAKE ANY FINDINGS OF FACT IN THE DISMISSAL ORDER.

In Kelley v. Everglades Drainage District, 319 U.S. 415, at 422-423, 87 L.Ed. 1485, at 1489, this Court stated:

". . .it is not the function of this court to search the record

> and analyze the evidence in order to supply findings which the trial court failed to make. . . .We hold that there must be findings, stated either in the court's opinion or separately, which are sufficient to indicate the factual basis for the ultimate conclusion."

Your petitioner respectfully submits that a dismissal without any articulated factual basis, harmfully, prejudicially, materially denies petitioner both substantive and procedural due process of law as guaranteed by the Fifth Amendment, U.S. Constitution. (Chapman v. California, 386 U.S. 18, 17 L.Ed.2d 705, 87 S.Ct. 824 (1967).

WHEREFORE, petitioner Robert A. Buss prays that this Honorable Court grant his petition for writ of certiorari, directed to the United States Court of Appeals for the Ninth Circuit and reverse and remand this matter, pursuant to Title 28 U.S.C.,

Section 2106, for a jury trial on the merits.

DATED: December 7, 1984.

Respectfully submitted,

JOAN CELIA LAVINE

Attorney for Petitioner-Plaintiff ROBERT A. BUSS

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APPENDIX A

F I L E D

JAN 31 1978

Clerk,U.S. DISTRICT COURT
Central District of California

(init.)

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN THE MATTER OF ADDITIONAL DUTY ASSIGNMENTS TO MAGISTRATES) ORDER OF THE CHIEF JUDGE

Upon recommendation by the Magistrate Committee and approval by the Court,

IT IS HEREBY ORDERED that the following duties are assigned to the Magistrates effective February 1, 1978, for a period of 180 days or until further order of the Court.

1. Discovery Motions. On all civil cases filed on or after February 1, 1978, the Clerk's Office will assign both a District Judge and a Magistrate to each case. Assignments will be made through

the wheel. When a discovery motion is filed in any civil case, the Clerk's Office will notify the District Judge of the filing and the nature of the motion. The District Judge may, in his discretion, elect to hear and decide the motion or may order the motion referred to the Magistrate assigned to the case for the purpose of allowing the Magistrate to hear and decide the motion.

2. Special Order Transfers. On any civil case pending prior to February 1, 1978, a District Judge may assign discovery motions to Magistrates by special order. Assignment to a Magistrate will be made through the wheel.

Motions for discovery include all motions filed pursuant to Rules 26 through and including 37 of the Federal Rules of Civil Procedure.

In the course of performing the duties relating to discovery motions, the Magistrates will be required to utilize and enforce Local Rule 3(l), discourage continuances and the taking of such motions under submission.

On all discovery orders, rulings, and decisions, no motion for reconsideration by a District Judge may be filed by the parties or their counsel.

3. Civil Trials. All civil trials, both jury and non-jury, may be transferred to a Magistrate upon stipulation of the parties and order of the Court. Assignment to a Magistrate will be made through the wheel. Judgment will be entered by the Magistrates.

4. Grand Jury Returns. All grand jury returns will be received and handled by the Magistrates. The Magistrates shall establish their own duty calendar for this purpose.

DATED:(Jan. 31, 1978) /s/
Albert Lee Stephens, Jr.
Chief Judge

APPENDIX B

F I L E D
JUL 24 1978
CLERK,U.S. DISTRICT COURT
Central District of California
(init. J)
Deputy

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

PLAINTIFF(S)

ROBERT A. BUSS,

DEFENDANT(S)

WESTERN AIRLINES, INC.

CASE NUMBER
CV 77-124-LEW(Kx)

SPECIAL ORDER OF ASSIGNMENT OF MATTER TO A UNITED STATES MAGISTRATE

Pursuant to an Order of the Chief Judge the undersigned hereby orders the case returned to the Clerk for reference to a United States Magistrate for the purpose of hearing ALL FURTHER DISCOVERY MATTERS.

On all discovery order, rulings, and decisions entered by a magistrate, no motion for reconsideration by a district judge may be filed by the parties or their counsel.

5.

IT IS FURTHER ORDERED that the Clerk serve copies of this Order forthwith by United States mail on counsel for all parties appearing in this case.

Dated: (21 July 78

/s/ Laughlin E. Waters
United States District Judge

NOTICE TO COUNSEL FROM CLERK:

This case has been referred to Magistrate JOHN R. KRONENBERG for the specific purpose of hearing and deciding the above discovery matter. Please add the magistrate's initials to the case number so that the case number reads as follows: CV77-124-LEW(Kx) and the words DISCOVERY MATTER on the caption of all documents dealing with discovery in this case.

APPENDIX C

FILED
OCT 13 1978
EMIL E. MELFI,JR.,
Clerk, U.S. Court
of Appeals

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. BUSS,	)No. 78-3174
Petitioner,	)D.C. # 77-0214
vs.	)Central Calif.
UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, et al.,	) ORDER
Respondents,	)
and	)
WESTERN AIRLINES, INC.,	)
Real Party in Interest.	)

Before: CHOY and SNEED, Circuit Judges.

On consideration of the petition for writ of mandamus filed herein on September 29, 1978, the Court issues the following order:

(1) That the clerk shall serve a copy of this order upon the interested district court judge and all parties to the action below. Such service shall be made by mail, and service on the parties may be effected by mailing copies to the parties' attorneys of record in the district court;

(2) Answers to the petition will be filed according to the provisions of Rule 21(b), Fed.R.App.P., and they will be filed within twenty-one (21) days of the date this order is entered;

(3) Petitioner may file, within thirty-five (35) days of the date this order is entered a reply to any answers which may be filed;

(4) Following receipt of any responses, the petition shall be passed for

consideration to the next regular motions panel;

(5) If the Court shall require oral argument, the time for such argument will be subsequently fixed and the parties notified; and

(6) Petitioner's request for the Court to act on an emergency basis is denied.

Mo Cal 10/10/78

APPENDIX D

FILED

AUG 15 1979
Clerk, U.S. District Court
Central District of California
By Deputy

JOAN CELIA LAVINE
617 South Olive St., Suite 510
Los Angeles, California 90014

(213)627-3241

Attorney for Plaintiff Robert A. Buss

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., a corporation, Defendant.	NO. CV-77-124-LEW (Kx)

LOCAL RULE 3(1) STIPULATION OF COUNSEL RE DISCOVERY SOUGHT IN PLAINTIFF'S MOTIONS DATED JUNE 29, 1979, JULY 10, 1979 AND JULY 20, 1979 AND FURTHER DISCOVERY SOUGHT

* * * * * *

Topic No. 3: What the policies and practices of the defendant Western Airlines, Inc., are as to the retirement of non-pilot employees, servants, corporate officers, managing agents and corporate directors of defendant Western Airlines, Inc.

PLAINTIFF'S CONTENTION NO. 4:

The plaintiff is entitled to determine the scope and extent of the defendant's practice of involuntary retirement and to determine whether the plaintiff was a victim of this form of involuntary discharge on account of age. (Title 29 U.S.C., Sections 623-631)

One form of age discrimination is involuntary retirement of any kind prior to the age of 70.

The defendant may not use age as a determining factor in cutting costs. The the plaintiff is entitled to know whether

the "retirement" of older employees was being used as a means of "cost reduction". (Title 29 CFR, Sections 860.102-860-104; Bishop v. Jelleff Associates, 308 F.Supp 579; Laugesen v. Anacondia Company, 510 F.2d 307)

The plaintiff's request on this topic was entirely precluded from this series of depositions, and yet involuntary retirement is a direct violation of Title 29 USC, Sections 623-631.

No one has ever been designated post facto or otherwise on this topic. The defendant fails to point out those areas of depositions referred to which it claims satisfy this topic, and its opposition is void for vagueness. Plaintiff moves to strike.

To the best of this counsel's recollection, Mr. Schnitzer did not indicate any particular knowledge of statistical data

showing age discrimination or lack of it. (Defendant Western's Contention No. 4)

4. With respect to Paragraph 3 of plaintiff's July 18, 1978 notice of desposition:

(a) This has already been covered in the depositions of Donald W. Vena, Dominic P. Renda and William J. Morrison

(b) Mr. Robert Schnitzer was deposed in detail on the provisions of Western's retirement plans. Mr. Schnitzer is a benefits plan administrator employed by a private consulting firm Western has retained to administer most of its pension plans.

* * * * * *

Topic No. 8: What the salaries of all corporate officers, directors, executive personnel have been during the years 1974, 1975, 1976, 1977, 1978 as well as bonuses, benefits, pension plans, insurance agreements for those with Western Airlines, Inc., in siad capacities.

PLAINTIFF'S CONTENTION NO. 9:

Plaintiff contends that he is entitled to this information to determine his damages, including his loss of salary and other benefits being given employees and executive personnel at Western and reflecting how the inflationery trends have impacted his losses. Plaintiff is entitled to determine whether his discharge was a cost-saving device due to his age and his impact on any retirement plan that Western was required to fund.

Plaintiff was supplied with a sheet, attached hereto and marked Exhibit "C", NOT

UNDER OATH AND NOT SUBJECT TO CROSS-EXAMINATION OF A DESIGNATED DEPONENT, which contained only a gross salary and per diem allowance, without such information as the entire 1978 salary or any fringe denefits which may be valued at as much as one-third of his income of Mr. Morrison, the man who replaced Mr. Buss. (U.S. v. Englis, 521 F.2d 63)

This counsel has been advised that another man, Mr. McDonald, replaced Mr. Buss between the time that Mr. Buss was terminated on October 17, 1975 and the time that Mr. Morrison took over. No information concerning his salary, benefits or advantages from employment has been provided to the plaintiff. It is reasonable to believe that if Mr. Buss had continued working, he would have been paid the same salary as those replacing him.

The plaintiff is entitled to determine whether there was or is a pattern or practice of age discrimination as a cost saving factor, impacting either salaries or fringe benefits such as pension or retirement plans. This topic has been demonstrated to be a fully valid one and has been urged by the United States Supreme Court in McDonnell Douglas v. Green, 411 US 792, 36 L.ed.2d 668. (See also Burns v. Thiokol Chem. Corp., 483 F.2d 300)

This Court has acknowledged this plaintiff's right to do discovery in this area in order to do a statistical analysis of the patterns and practices in employment at Western Airlines, particularly on the topic of age as a a consideration or criteria.

It is noted that when Mr. Morrison was asked about his income, he did not have a clear recollection of the figures and was

not prepared to respond on his own income and fringe benefits.

(Defendant Western's Contention No. 9)

9. As to Paragraph 8 of plaintiff's July 18, 1978, notice of deposition, plaintiff seeks this information for an improper purpose, to wit, the calculation of damages. Plaintiff's damages are fixed by the ADEA as unpaid wages and liquidated damages in an equal amount, if a violation is found to be willful. 29 U.S.C. § 216(b); § 626(b). Western has already furnished plaintiff with full salary information on plaintiff's replacement, William Morrison, over one year ago.

* * * * * *

EXHIBIT "C"

(Handwritten)

W. J. Morrison

Employee # 06615

Year	Gross Wages	Perdiem
1974	55618.42	269.10
75	60824.31	200.20
76	69603.96	280.15
77	78349.90	126.30
78	63810.00	91.80

Pauline Davis

Payroll Asst.

APPENDIX E

FILED
DEC 20 1979
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT OF
CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS,	) CV 77-124-LEW(Kx)
Plaintiff,	) ORDER RE
v.	) DISCOVERY
WESTERN AIRLINES, INC.,	)
Defendant.	)

Plaintiff filed a motion for discovery on November 17, 1979, set for hearing on December 17, 1979, and the Court continued the matter on its own motion by order filed December 14, 1979. Plaintiff's counsel having appeared on December 17, 1979, to request that the Court grant the relief sought in the motion,

IT IS HEREBY ORDERED that all discovery deadlines previously established in this lawsuit are rescinded. All further discovery matters in this case are referred to the magistrate for determination. Each future motion before the magistrate shall involve one, and only one, item of discovery sought. After he makes his determination, the magistrate shall refer each motion to this Court for review.

IT IS FURTHER ORDERED that the magistrate shall require the parties to submit, in place of the purported "Local Rule 3(1) Stipulation" filed August 15, 1979, a stipulation that complies with the requirements of Local Rule 3(1), i.e., a stipulation "specifying with particularity the issues remaining to be determined upon the hearing and the contentions of each party as to each such issue.

DATED: December (20), 1979

/s/
Laughlin E. Waters
United States District Judge

APPENDIX F

DARLING, HALL, RAE & GUTE
400 Pacific Mutual Building
523 West Sixth Street
Los Angeles, CA 90014
627-8104

Attorneys for Defendant

LODGED
JUL 1 3:53 PM '80
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

FILED
JULY 3 1980
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, v. WESTERN AIR LINES, INC., Defendant.	No. CV 77-0124 TJH (Kx) ORDER REGARDING PRE-TRIAL PROCEEDINGS

Defendant's Motion For Sanctions Relating to Pre-trial Proceedings and Plaintiff's Ex Parte Application For Order to Show Cause came on for hearing before this Court on June 30, 1980. The Court having considered

all papers filed in reference thereto, and the affidavits of counsel, and both parties having appeared and full argued the matter.

IT IS HEREBY ORDERED:

1. Pursuant to a stipulation of the parties, the Pre-trial Conference is continued to August 11, 1980;

2. Counsel for both parties shall meet on July 21, 1980 at 10:00 a.m. at the offices of Darling, Hall, Rae & Gute to discuss the contentions of the parties, and to arrive at stipulations and agreements for the purpose of simplifying the issues to be tried, and to exchange all information required by Local Rule 9(d) and this Court's order of February 21, 1980;

3. Tape recording or other reproduction of meetings between counsel shall not be permitted.

4. Counsel for plaintiff, Ms. Joan C. Lavine, shall deliver to the Court prior to 10:00 a.m. on July 1, 1980, the original cassette tape recording of the meeting between Ms. Lavine and Mr. Giannini on June 18, 1980 at Ms. Lavine's office. If this cassette tape is not produced as provided above, Ms. Lavine is ordered to pay sanctions in the sum of Four Hundred and Fifty Dollars ($450.00) to defendant, Western Air Lines, Inc., for attorney's fees incurred as a result of counsel's failure to meet with counsel for defendant, as required by Local Rule 9(d) and this Court's previous orders.

Dated: July (3), 1908

/s/
Terry J. Hatter
United States District Judge

VERIFICATION

. . . .

PROOF OF SERVICE BY MAIL

I am imployed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is 523 West Sixth Street, Suite 400, Los Angeles, California 90014.

On (July 1), 19(80), I served the foregoing document described as (Order Regarding Pre-Trial Proceedings) on (the party) in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Ms. Joan C. Lavine
304 South Broadway, Suite 410
Los Angeles, California 90013

Executed on (July 1), 19(80) at Los Angeles, California.

(State) I declare under penalty of perjury that the above is true and correct.

x (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

_____
(Signature)

APPENDIX G

JOAN CELIA LAVINE
304 S. Broadway
Los Angeles, California 90013
Telephone: (213)627-3241
Attorney for Plaintiff
Robert A. Buss

RECEIVED
JUN 30 1980
CENTRAL
DISTRICT OF
CALIFORNIA
CLERK, U.S.
DISTRICT COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	CASE NO. CV-124-TJH(Kx) RECEIPT FOR TAPE OF PRETRIAL MEETING ON JUNE 18, 1980

Florence Kato, clerk to U.S. District Judge Terry J. Hatter, acknowledges receipt of a tape of pretrial meeting which took place on June 18, 1980 between counsel in the above entitled matter.

Receipt is hereby acknowledged this 30th day of June, 1980.

/s/
FLORENCE KATO, Clerk
to Judge Hatter

RETURNED AND RECEIVED THIS DATE

(Aug. 11, 1980)

/s/
Joan Celia Lavine

APPENDIX H

FILED
JUL 23 1980
RICHARD H. DEANE
CLERK, U.S.
COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. BUSS,

Petitioner,

No. 80-7364
DC# CV 77-124-TJH

THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA,

Respondent,

ORDER

WESTERN AIRLINES, INC.,

Real Party in Interest.

Before: POOLE and FERGUSON, Circuit Judges

The emergency motion for reconsideration of the previous order of this court which denied a petition directing the district judge how pretrial conferences must be conducted is denied.

While reasonable persons may differ about the nature of the controversy presented by petitioner, the dispute does not reach that degree of extraordinary circumstances which causes this court to interject itself in pretrial conferences.

While reasonable persons may differ about the nature of the controversy presented by petitioner, the dispute does not reach that degree of extraordinary circumstances which causes this court to interject itself in pretrial conferences.

APPENDIX I

JOAN CELIA LAVINE
304 South Broadway, Suite 410
Los Angeles, California 90013
Telephone: (213)627-3241
Attorney for Plaintiff
Robert A. Buss

FILED
JUL 25 10:09
AM '80
CLERK, U.S.
DISTRICT COURT
CENTRAL DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	) CASE NO. CV-77-) 124-TJH(Kx)))DECLARATION OF JOAN)CELIA LAVINE IN)SUPPORT OF MOTION)FOR CONTINUANCE OF)PRETRIAL CONFER-)ENCE HEARING AND OF DATE FOR PRE- TRIAL MEMORANDUM UNDER LOCAL RULE 9(e)

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

JOAN CELIA LAVINE, attorney at law, makes the following declaration under penalty of perjury:

I am and have been at all times mentioned herein duly licensed to practice law in the state of California and in the above entitled Court and have been the attorney for the plaintiff Robert A. Buss at all times mentioned herein.

On July 24, 1980, defense counsel Paul L. Giannini came to my offices for a continued Local Rule 9 meeting. The meeting was scheduled for 2:00 p.m., but Mr. Giannini arrived about 40 minutes late.

He entirely failed to display any exhibits to me at all although he had represented to my on July 22, 1980 that he had exhibits to display to me, but would not show them to me until our meeting on July 24, 1980.

He handed me a document which he characterized as a "draft" of a pretrial statement of contentions. This statement contained

contained contentions which appear to me to be false and which had never been conveyed to me before to the best of my recollection. In particular, for the first time Western Airlines has contended that Mr. Buss's department operated with ONE-THIRD FEWER EMPLOYEES under his successor, to the best of my recollection.

From what I could understand of Mr. Giannini's remarks, their present actuary expert is a Mr. Bruce Wallace, not the man whose deposition I took, a Mr. Schnitzer. To the best of my recollection no witness list was supplied to me under Local Rule 9 indicating anyone other than Mr. Schnitzer or that there was any potential that different testimony than that of Mr. Schnitzer might be given, who was held out until today as their actuary expert.

At the July 24, 1980 meeting Mr. Giannini handed me a "draft" of a witness list. I tried to confirm whether there would be any additions to alterations to it, but all he would say is that that was his list "as of today", to the best of my recollection.

Mr. Giannini claimed that the memorandum of contentions he had as a "draft" had omitted page three which would be available for me to have picked up tomorrow, July 25, 1980. However, Mr. Giannini called after the meeting and told me that nothing would be available until Monday, July 28, 1980.

We spent almost our entire time at this meeting, which went on for about alittle over an hour, with Mr. Giannini reviewing documents I displayed to him. He displayed none to me.

I believe we achieved one stipulation: that the United States District Court has jurisdiction to hear and determine the above entitled matter under the Age Discrimination in Employment Act.

Although Mr. Giannini stated to me that he would have his completed contentions available for me to pick up tomorrow morning and that I could have someone pick them up, he then said that he would be unavailable and not in the office for me to get anything.

Mr. Giannini told me on July 22, 1980 at our meeting that he would display his documents to me on July 24, 1980 when I displayed mine to him. On July 24, 1980 when he came to my offices, I had five piles of documents laid out for him to examine, but he produced none. I had shown documents I could carry July 22.

When Mr. Giannini had telephoned during the late afternoon on July 24, 1980 after our meeting that day, he told me that he was redoing his exhibit list. The import of this statement to me is that he is adding or changing his exhibits and that he has not displayed to me all of the exhibits that he intends to use at trial.

I respectfully submit that Mr. Giannini has failed to comply with Local Rule 9 to convey to me/ Local Rule 9(d) data substantially in advance of the due date of a contention of law and facts 14 days before any pretrial conference hearing and the hearing date itself what his client's position is. Mr. Giannini has never at any time said that he wanted time, except to go on a vacation to do any pretrial Local Rule 9 work this year, to the best of my recollection.

I also move that the ex parte application of the plaintiff/ be granted for an order to show cause to be issued as to why the defendant Western Airlines and its counsel should not be held in contempt which was first heard on June 30, 1980 in the above entitled matter, which papers were received herein June 27, 1980.

If called upon and sworn to testify to the foregoing statements of fact, I would be competent to so testify and certify under penalty of perjury that the foregoing is true and correct to the best of my knowledge and recollection, except as to those matters based on information and belief and as to those matters, I believe them to be true.

WHEREFORE, the plaintiff Robert A. Buss prays for a continuance of the pretrial conference date to September 15, 1980 herein

and that an order to show cause be issued why the defendant and its counsel should not be held in contempt for failure to comply with the provisions of Local Rule 9. Plaintiff seeks reasonable attorneys' fees for being required to bring these proceedings of $1000.00.

Executed on July 24, 1980 at Los Angeles, California.

/s/

Joan Celia Lavine

JOAN CELIA LAVINE, Attorney for Plaintiff Robert A. Buss and Declarant

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above entitled cause. On (July 25, 1980) I served a true copy of (DECLARATION OF JOAN CELIA LAVINE IN SUPPORT OF MOTION FOR CONTINUANCE OF PRE-TRIAL CONFERENCE HEARING AND OF DATE FOR PRETRIAL MEMORANDUM UNDER LOCAL RULE 9(e) by personally delivering it to the person(s) indicated below in the manner as provided in F.R.Civ.P., Rule 5(b):

Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90013

Executed on (July 25, 1980) at Los Angeles, California.

I hereby certify that I am employed in the offices of a member of the Bar of this

Court at whose direction the service was made. I certify under penalty of perjury that the foregoing statements are true and correct

/s/ Linda Westbrook
(Signature)

No. 84-938

Office - Supreme Court, U.S.
FILED
DEC 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOAN CELIA LAVINE
Attorney at Law
123 North Hobart Boulevard
Los Angeles, California 90004
(213) 627-3241

Attorney for Petitioner
Robert A. Buss

Vol. II of III

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APPENDIX J

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE TERRY J. HATTER, JR.
JUDGE PRESIDING

ROBERT A. BUSS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	CV 77-124-TJH
	)	
WESTERN AIRLINES,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Date: Monday, August 4, 1980

PATRICIA FERRIER
Official Reporter
410 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 628-8423

APPEARANCES:

For the Plaintiff:

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Los Angeles, California 90069

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For the Defendant:

Darling, Hall, Rae & Gute
By: PAUL L. GIANNINI
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Suite 400
523 West Sixth Street
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LOS ANGELES, CALIFORNIA, MONDAY, AUGUST 4, 1980, 10:15 A.M.

-o-

THE CLERK: Item number ten, civil action CV 77-124, Robert Buss versus Western Airlines.

Counsel, please make your appearances.

MS. LAVINE: Good morning, your Honor. Joan Celia Lavine appearing for the Plaintiff, Robert A. Buss.

THE COURT: Thank you, Ms. Lavine.

MR. GIANNINI: Good morning, your Honor.

MS. LAVINE: Excuse me. And my father, Morris Lavine, is also appearing. He is also appearing on my behalf personally, and also on behalf of Robert Buss. Mr. Buss; is that correct?

MR. BUSS: That is right.

MR. GIANNINI: Good morning, your Honor. Paul Giannini for defendant Western Airlines.

THE COURT: Thank you, Mr. Giannini.

Go ahead, Ms. Lavine.

MS. LAVINE: Thank you, your Honor. I have two matters before you this morning.

THE COURT: Yes.

MR. LAVINE: The first is what I had thought was really a rather perfunctory kind of motion to amend the complaint to increase, basically, the damages allegations.

As your Honor, I am sure, is fully aware, even if I had not amended and had simply gone to trial Rule 54(c) of the Federal Rules of Civil Procedure provides as follows:

> "Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings."

The kind of lawsuit that this is, an age discrimination suit, is the kind of lawsuit which I brought when the law was really a baby and still in its infancy and developing. And there is a lot of litigation going on about what kind of damages can be obtained.

We did discovery in this case, and it turned out that Mr. Buss' damages were substantially greater than what we had originally realized. As a matter of fact, I might comment to you at one time we probably would have settled this case for $60,000.00. But after we did discovery we knew this case was worth far more than that.

My opposition had asked me at one of our meetings about the kind of damages, and I told him that I would let him know what kind of damages we are seeking. And I have chosen this means of giving him as

full notice as is possible.

I would like to point out to you that we are handicapped by still not having received full information about the successors' pay, including his fringe benefits. My opposition complains that, for instance, we seek liquidated damages.

I invoked the jurisdiction of this Court under Title 29, Section U.S.C., Section 626 in the first amended complaint that was filed in 1977.

That provides for liquidated damages, and it provides for all of the damages, I believe, that we are seeking. There is a lot of litigation going on still about what kind of damages are available, and probably up to the time of trial we will still be in limbo as to that kind of a problem.

However, I do wish to give my opposition notice now. I could have waited

until after the case had been tried and simply have amended the complaint, but I chose to do the notice-giving in this manner, because I feel it is the most appropriate.

Do you have any questions to ask me, and do you disagree with me?

THE COURT: I want to hear from Mr. Giannini. I would ask you why it has taken so much time for you to determine that you need to file the seconded amended complaint, however.

MS. LAVINE: Your Honor, for over two years we have been trying to get damages discovered. You will note that I still have pending in the Ninth Circuit a writ to obtain the complete information about successors' income.

We indicated in a deposition of Mr. Buss about a year ago, a little over

that, fifteen months ago, that we needed Mr. Morrison's payroll records in order to be able to completely compute those damages. We cannot. We still cannot do that, except by projecting on a theory basis from what partial information we have. That is the problem.

We have had a bitter knock-down dragged-out battle. I am sure you have been receiving my copies of briefs as we have gone on, and over and over and over again I have asked for these records.

Mr. Buss in his deposition fifteen months ago notified the defendant that he needed Mr. Morrison's payroll records in order to compute the damages properly.

In the Ninth Circuit I filed this last week a declaration of our economist, Mr. Raymond Schultz, that this information is essential.

Your Honor, we have been litigating this for two years. Now, I respectfully submit that the magistrate originally ordered that this information be supplied to us, but that it has not been. And I would direct your Honor's attention to an order of the magistrate dated August 17, 1978 in which he ordered that the salary and benefits of successors of Mr. Buss and his position be provided to Mr. Buss.

The only thing that was supplied to us was an accounting sheet with partial information. You may recall that accounting sheet listed gross salary and per diem, and it went through part of 1978. It does not go beyond that.

And for that reason we are still in a position where the defendant has not given us the discovery that we need to have completed the alteration of the

complaint. However, again, I say to your Honor, even if I had not sought to amend the complaint for this reason I believe that you would be duty bound to have awarded the damages under Federal Rules of Civil Procedure 54(c).

Do you agree with me?

THE COURT: As I say, I want to hear from Mr. Giannini before I express any opinion.

MS. LAVINE: By the way, Mr. Giannini says that he asked about various kinds of damages in the deposition. I did not find him asking anything very specific. I only found him asking a few questions, and we kept replying, Mr. Buss kept replying that he needed further discovery from the defendant in order to give full information.

We are at this point, and the best I can I do is to amend the complaint based on what we have got. Thank you.

THE COURT: All right. Thank you, Ms. Lavine. Mr. Giannini.

MR. GIANNINI: Good morning, your Honor. I believe I cited several Ninth Circuit cases to the effect that the inexcusable delay of the nature that we are talking about here is a sufficient ground for denying an amendment to the complaint, alone, without other factors --

THE COURT: Suppose we deny it. What about the statement that Ms. Lavine makes with regard to 54(c) of the Rules of Civil Procedure?

MR. GIANNINI: I agree that Ms. Lavine's client is entitled to compensatory damages. I am not arguing with that here.

What I am arguing with are the other issues that are being inserted, such as pain and suffering damages, liquidated damages which are statutory, which existed at the time the original complaint was filed and should have been taken care of when she filed a first amended complaint three months after the original complaint.

There is no new change in the law here that Ms. Lavine is talking about. She has not cited any. The complaint was amended effective April of 1978. So far as there

being a discovery basis for the amendments, there was a discovery cutoff date imposed by the magistrate of March last year. There have been two items of discovery since that time, your Honor.

One was defendant's corporate minutes, which I have not seen as even a potential exhibit in this case, and the other is a list of employees that were furloughed at Los Angeles and that were produced one year ago.

So I don't see any new items that were brought up in discovery that would be a basis for this.

Ms. Lavine is simply seeking to delay the trial date. This is going to cost us at least six months because I am going to want to file a motion on the new complaint. I don't believe they state a claim.

We are going to have to retain an expert to testify as to Mr. Buss' mental condition, if he is going to bring that in issue now for the first time. And apparently Ms. Lavine has retained experts on that.

And we have a witness who has a pacemaker who is a crucial witness in this case; Mr. Buss' immediate supervisor, has retired, taken early retirement from the company. And I have no control over this man.

He may leave the jurisdiction, he may have additional health problems. I think any further delay in this case is going to severely prejudice our defense, because it is based on this witness and other witnesses.

So I would submit there has been no showing as to why there has been this lengthy delay, your Honor. Thank you.

MS. LAVINE: May I respond?

THE COURT: Yes, Certainly. It is your motion.

MS. LAVINE: I would very much like to bring back Mr. Johnson to have him redeposed. There is a critical note which is in hot dispute here. A copy of what we believe is not the note was provided to us, and if indeed Mr. Johnson does have a heart condition, if something might happen to him, his testimony should be taken and quite soon.

We have no discovery cutoff, your Honor. Judge Waters' vacated any cutoff dates in an order, ad I recall it, dated December 20, 1979, and discovery is still open to be done. There is no problem about doing it.

Now, I don't understand how Mr. Giannini thinks it is going to take another

six months to deal with these problems. I don't know what is in his mind when he says that.

If our complaint failed to state a cause of action or state a claim under federal practice, certainly they would have litigated that a long time ago. I don't quite understand how he can say that at this point, except that I assume he could raise that point at any time as a jurisdictional kind of issue.

He says he agrees that we are entitled to compensatory damages. Pain and suffering is a form of compensatory damages that one does not even need to plead in order to recover under both federal and state pleading practice.

If we had not asked for it at all we would still be entitled to it.

THE COURT: If that is true then why don't we just proceed? We have a pre-trial conference date set for next week. I want to move on.

MS. LAVINE: May I suggest this: I will be certainly willing to accept the answer they have vis-a-vis this complaint, the second amended complaint.

All it does is increase the damages allegations.

THE COURT: I take it that Western Airlines would not want to do that, Mr. Giannini?

MR. GIANNINI: It is more than damages, your Honor. There are different allegations as to the theory of the claim that Mr. Buss is making.

THE COURT: All right. I am going deny the motion. And I am also denying the motion to continue the pre-trial conference.

We have it set for August 11. We want to move on with this. And, as you point out, Ms. Lavine, you can certainly increase your damage amount under 54(c), and we will proceed in that fashion.

MS. LAVINE: And you will, of course, award to Mr. Buss any damages to which he is entitled under the statute; is that what I understand?

THE COURT: That he is entitled to, yes.

MS. LAVINE: Certainly. Of course, you understand that does include liquidated damages under 626?

THE COURT: Also we have the matter of the tape of the proceeding between you and Mr. Giannini. I believe it was dated June 18, 1980.

Would you make a copy of this available to Mr. Giannini, please.

MS. LAVINE: Sir, you have the tape.

THE COURT: Yes, I have it here. I was about to give it back to you so that you may make a copy for Mr. Giannini.

MS. LAVINE: I see.

THE COURT: Could you do that?

MS. LAVINE: I don't know if I would be able to physically. I think -- yes, I think I could probably take it to a tape duplicator.

THE COURT: I am not sure that is necessary. What we, perhaps, can do is have the Clerk's Office, if you will furnish a blank tape, Mr. Giannini, just run off a copy at their convenience. And you may pick this up from the Clerk's Office.

Let's set a date for this so that you will have it back in your possession. Let's have this done by Friday noon. I am order the Clerk's Office to do it.

(Whereupon the Court and Clerk confer.)

MS. LAVINE: Your Honor, I am having quite a bit of difficulty being able to get my paper work out in this case because Mr. Giannini has repeatedly provided me with information very late.

THE COURT: Are you talking about the list of exhibits and witnesses, now?

MS. LAVINE: And contentions.

THE COURT: And contentions. Well, it has been filed and it is within the time, as I understand it, and more than fourteen days before the scheduled pre-trial conference on the 11th.

Are you having some problem with that?

MR. GIANNINI: Yes, we are.

MS. LAVINE: Your Honor, wouldn't you agree that under the forty day rule I am entitled to have been conveyed the contentions

quite a bit more in advance than fourteen days?

THE COURT: Let's find out why you got them as late as you did. Mr. Giannini?

MS. LAVINE: And, by the way, I have had quite a bit of difficulty contacting Mr. Giannini. At the end of last week I ended up having to write him two notes.

MR. GIANNINI: Your Honor, on the 24th of July Ms. Lavine and I had a meeting at her office where she showed me documents which she indicated were going to be her trial exhibits, many of which I had not seen before, apparently that were obtained through the Freedom of Information Act by Ms. Lavine.

At that time she told me she could not make copies of the documents because of the Court's order that there be no reproduction of conferences between counsel

in this case.

I told her I did not interpret the Court's order that way as far as copies of documents, and that I wished --

THE COURT: Nor should you have, nor should Ms. Lavine.

What we are talking about is specifically the kind of matter which is incorporated in this tape. And I indicated very specifically we are not to tape meetings between counsel.

Now, you may tape, as the magistrate had indicated, discovery proceedings. And I would not include meetings between counsel to be part of the discovery proceedings; but to merely duplicate and copy material, and to give it to counsel, is not encompassed by my order at all.

MS. LAVINE: May we have a stenograph reporter present at these meetings?

THE COURT: For what purpose?

MS. LAVINE: One, to make sure that we have all of our contentions and have them prepared and don't have to repeat them all over again to another secretary or into a dictating machine, and, two, so that you know exactly what took place.

THE COURT: Do you oppose that, Mr. Giannini?

MR. GIANNINI: Well, your Honor, I was going to get to that.

THE COURT: All right.

MR. GIANNINI: We have really a performance in my law office by Ms. Lavine with her father, her client, her father's nurse and the court reporter. And Ms. Lavine has got on the soapbox and made a lot of speeches, but we didn't accomplish very much.

And I feel that we would accomplish a lot more just if Ms. Lavine and I could meet to discuss the pre-trial order. I feel that she is putting on an act for her client, and I don't feel that the court reporter, which I told Ms. Lavine I objected to, was serving any purpose there other than Ms. Lavine's attempts to try and set me up for some kind of sanction in this case.

I told her that her contention should be in writing when the pre-trial rule was done.

I attempted to contact her Wednesday and Thursday by telephone of last week and was told she was out of the office and also out Friday.

So I see with the time remaining an impossibility on August 11 to get a pre-trial order in. Knowing the time it take with Ms. Lavine to stipulate to things I

don't see how we are going to get an order in this week, your Honor.

THE COURT: Maybe the case is going to have to be dismissed and started all over again. I don't understand why two members of this bar cannot get together and comply with the local rules, and provide this Court with a proposed order so that we can move along.

In the absence of that, perhaps, then, we should just be more rigid in our application of the local rules. I expect there to be a diligent effort made by both counsel here to be ready for the pre-trial conference. And it is August 11. It will remain that.

And if we find that we are not proceeding, for whatever the reasons are, then I will have to deal with those next week. All right.

MR. GIANNINI: At this date I may have some problems with another matter that is before this Court and I may be engaged in deposition in the next two days. So that is going to take at least --

THE COURT: That is something that you are going to have to work out with Ms. Lavine. You are going to have to make yourself available to some degree. And it has to be, of course, reasonable, whatever requests Ms. Lavine makes of you and you of her.

And, as I say, I expect to see the fruits of this labor on Monday, the 11th. In the absence of that, depending upon why we have not been able to reach the goal that has been set, then I will have to make a determination as to where the fault lies and deal with proper sanctions.

MR. GIANNINI: Do we have a one week continuance, your Honor, to the 18th?

THE COURT: There will be no continuance.

And with regard to the stenographic recording of any meetings between counsel, unless given the advance approval of this Court there will be none.

MS. LAVINE: Your Honor, I object to that under the due process clause of the Fifth and Fourteenth Amendments.

THE COURT: Fine.

MS. LAVINE: And Title 28, and the Fifth Amendment and Title 28 U.S.C. Section 753.

And I again request the right to a stenographic reporter for coverage of all proceedings.

THE COURT: It is denied. All right. The next matter, please.

MS. LAVINE: Your Honor, my father wishes to address you on the sanctions that

you entered against me.

MR. LAVINE: Your Honor, I did not hear the proceedings which you had the last time, when I was present, in pronouncing any sanctions on Joan Lavine. This is the young lawyer who has a splendid record, and we like to keep it that way.

And when the matter finished, as I recall, your Honor stated that she was to deliver the tape to you, and we went outside, and I said, "Get it to the Judge today, if you can," and she brought it up here to you the very same day you asked for it.

And, now, the order at that time was that if she didn't produce the tape the sanctions would be pronounced.

THE COURT: Since she produced it, then, what is the issue here?

MR. LAVINE: Because the minute order reads that sanctions have been pronounced, an order that you entered two days after she produced the tape and after she had complied completely.

And I move to vacate or correct the Court's minutes.

THE COURT: All right. It will be corrected. Could we also correct those where she attempted to present me with sanctions?

MR. LAVINE: And will you vacate any --

THE COURT: Mr. Lavine, when your daughter attempted to cite the Court for whatever it was -- do you remember that? Can we vacate that as well?

MR. LAVINE: Yes, your Honor.

THE COURT: All right, Thank you.

MR. LAVINE: If your Honor corrects the minutes to show that there are no sanctions pronounced against her we will

vacate the order also, we move to vacate it.

THE COURT: I see.

MR. LAVINE: And I wish your Honor to instruct either the Clerk or opposing counsel to give us notice. We don't get notices.

The record will show that they have served papers on your Honor, which your Honor has signed, without any notice to us, and prior to giving us any notice or hearing.

THE COURT: The Court expects notice to go to all parties.

MR. LAVINE: Thank you, your Honor.

THE COURT: Thank you, Mr. Lavine.

MR. LAVINE: Thank you for your consideration.

THE COURT: Thank you very much.

* * *

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE TERRY J. HATTER, JR.,
JUDGE PRESIDING

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, Defendant.	)	CV 77-124-TJH

C E R T I F I C A T E

I, PATRICIA FERRIER, do hereby certify that I reported the proceedings in the above-mentioned cause on August 4, 1980. I further certify that the foregoing is a true, actual and correct transcript of said proceedings.

Los Angeles, California, dated this (15th) day of September, 1980

/s/
PATRICIA FERRIER
Offician Reporter

APPENDIX K

FILED
AUG 7 1980
CLERK, U.S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY (init) DEPUTY

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Los Angeles, California 90013

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Attorney for Plaintiff
Robert A. Buss

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., a corporation, Defendant.	CASE NO. CV-77-124-TJH(Kx)

PLAINTIFF'S STATEMENT OF PROGRESS RE PREPARATION OF PRETRIAL CONFERENCE STATEMENT

TO THE HONORABLE TERRY J. HATTER, U.S. DISTRICT JUDGE PRESIDING:

Comes now the plaintiff Robert A. Buss and presents to this Court a second Pretrial Conference Statement and Proposed Order thereon.

The defendant, through the counsel Paul L. Giannini, has advised plaintiff's counsel that he is unwilling to execute said document, apparently due to the reservations provisions contained on the signature page.

Plaintiff's counsel wishes to advise this Court that she was first conveyed what to insert in a pretrial conference statement yesterday in a piecemeal fashion. A portion contained in section IX was first conveyed to her close to noon yesterday, in a meeting at Mr. Giannini's office August 6, 1980/and then the defendant's counsel did not make his contentions of law and of fact available until about 3:30 p.m.

to 4:00 p.m. by leaving same at his office for her.

Plaintiff's counsel asked Mr. Giannini to come over to her offices at about noon today to go over a final draft attached hereto. Instead, he sent a messenger to her offices to pick up a copy, and did not communicate with Ms. Lavine until about 2:50 p.m. when he stated as set forth the above.

Plaintiff maintains that the pretrial statement is appropriate in its present form, and respectfully requests that this court execute his first proposed pretrial statement or this one as drafted.

Dated: August 7, 1980

Respectfully submitted,

/s/
Joan Celia Lavine
JOAN CELIA LAVINE, Attorney
for Plaintiff Robert A. Buss

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed at in the County of Los Angeles, State of California, and not a party to the above entitled cause. On August 7, 1980 I served a true and correct copy of PLAINTIFF'S STATEMENT OF PROGRESS RE PREPARATION OF PRETRIAL CONFERENCE STATEMENT

by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following

Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Place of Mailing: Los Angeles, California

Executed on August 7, 1980 at Los Angeles, California.

I hereby certify that I am employed in the office of a member of the Bar of this Court, at whose direction the service was made. I certify under penalty of perjury that the foregoing statements are true and correct of my own personal knowledge.

/s/

Joan Celia Lavine

Signature

BEST AVAILABLE COPY

JOAN CELIA LAVINE
304 South Broadway, Suite 410
Los Angeles, California 90013

Telephone: (213)627-3241

Attorney for Plaintiff Robert A. Buss

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	) CASE NO.)CV-77-124-TJH(Kx)

PROPOSED PRETRIAL STATEMENT

AND PROPOSED ORDER THEREON

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	) CASE NO.) CV-77-124-TJH(Kx)

PLAINTIFF'S PROPOSED PRETRIAL STATEMENT AND PROPOSED ORDER THEREON

I. TYPE OF ACTION AND THE PARTIES TO THE ACTION

This action is a lawsuit brought by the plaintiff Robert A. Buss against the defendant Western Airlines, Inc., for age discrimination in employment pursuant to the provisions of the Age Discrimination in Employment Act of 1967, Title 29 United States Codes, Sections 621, et seq., and particularly Sections 621, 623, and 626 and Section 15 of the Fair Labor Standards of 1938, as amended Title 29 United States Codes, Section 201, et seq., and the Fifth and Fourteenth Amendments, U.S. Constitution.

The pleadings which raise the issues in this case are all of the papers and pleadings on file herein. This includes the first amended complaint, the answer thereto and this proposed pretrial conference statement and order as well as all the other

files and records herein.

II. FEDERAL JURISDICTION AND VENUE

Federal jurisdiction is invoked by the plaintiff based on Title 29, United States Codes, Sections 621, et seq., and particularly Sections 621, 623, and 626, and Section 15 of the Fair Labor Standards Act of 1938, as amended Title 29 United States Codes, Section 201 et seq., and the Fifth and Fourteenth Amendments.

Plaintiff timely filed his notices of intent to sue the defendant Western Airlines at both the state and federal levels, on or about December 30, 1975 and November 17, 1975 respectively.

The United States District Court has jurisdiction to hear the claims of the plaintiff as provided for in the above stated laws of the United States.

Since the principal place of business of the defendant Western Airlines, Inc. is at Los Angeles, California within the Central District of California, the United States District Court for the Central District of California is the proper location for suit to be brought against it. There is no dispute that venue lies in this district.

III ADMISSION OF FACTS

It is hereby stipulated by and between the plaintiff Robert A. Buss, through his counsel Joan Celia Lavine, and the defendant Western Airlines, Inc., as follows:

1. The plaintiff Robert A. Buss is 67 (sixty-seven) years of age, having been born on January 23, 1913. On October 17, 1975, when he was involuntarily terminated from his employment with Western Airlines,

Inc., he was between 62 and 63 years of age. On October 17, 1975 and to the present Mr. Buss, the plaintiff, has at all times been within the protected class as provided for in Title 19 U.S.C., Sections 621, et seq., and particularly 621, 623 and 626 of Title 29 United States Codes.

2. The defendant Western Airlines is an "employer" within the provisions of Title 29 U.S.C., Sections 621, et seq., and particularly Title 29 U.S.C., Section 630(b), and Section 15 of the Fair Labor Standards Act of 1938, as amended Title 29 United States Codes, Section 201, et seq., and the Fifth and Fourteenth Amendments, U.S. Constitution, and therefore subject to said provisions and the enforcement of same.

3. The plaintiff duly and in a timely fashion registered complaints with the appropriate state and federal agencies and

notices of intent to sue and has exhausted his administrative remedies as required by law. This United States District Court has jurisdiction to proceed to trial in the above entitled matter and to enter judgment against the defendant Western Airlines, Inc. upon a finding of liability and damages. The plaintiff filed his appropriate notice of intent to sue and complaint with the United States Department of Labor on or about December 30, 1975. receipt of that notice of intent to sue was received on or about January 12, 1976, against Western Airlines for discharging him on account of his age on October 17, 1975.

The plaintiff Robert A. Buss filed a complaint and notice of intent to sue against Western Airlines alleging discrimination on account of his age due to his discharge on October 17, 1975 in writing

on November 17, 1975 with the Fair Employment Practice Commission, State of California, Agriculture and Services Agency.

4. The plaintiff Robert A. Buss was replaced in his position by a younger person, Robert Morrison, born on August 21, 1926, when Mr. Buss was discharged on October 17, 1975.

5. Mr. Buss has at no time been offered reemployment with Western Airlines since he was terminated on October 17, 1975.

6. Prior to his discharge from his employment with Western Airlines on October 17, 1975, he had worked for Western Airlines for about 35 years, starting in 1940.

7. At the time of his termination on October 17, 1975, Mr. Buss was Director, Flight Crew Ground Training. He had been in this position for about five years prior to his termination on October 17, 1975.

Plaintiff Robert A. Buss and defendant Western Airlines, Inc., a corporation, hereby admit the above stated facts in Section III, and paragraph 1, lines 4 to 8, ending with numbers "630(b)", page 18 hereof.

IV RESERVATION OF FACTS

The reservation as to the facts recited in paragraph III above are as follows: None has been supplied to plaintiff to date by the defendant.

V. UNCONTESTED FACTS

The following facts, though not admitted, are not to be litigated upon the trial: None has been supplied, however the plaintiff once again moves that this Court enter a default against the defendant so that there is an admission of liability and prevent the defendant from introducing any

evidence at the time of the trial on the damages.

VI. ISSUES OF FACT TO BE LITIGATED:

Except for the facts admitted in Section III hereinabove, and as contained on the following page, lines 13 and 14, the following issues of fact remain to be litigated, to-wit:

If this Court does not enter a default against the defendant, then the issues of liability indicated below remain to be litigated.

PLAINTIFF'S CONTENTIONS OF FACT

Comes now the plaintiff Robert A. Buss and sets forth the following contentions of fact, to-wit:

1. Plaintiff was illegally, wilfully, wantonly, intentionally discharged and

terminated from his employment with Western Airlines, Inc., as Director, Ground School Flight Training on and as of October 17, 1975 on account of his advancing age in violation of Title 29 U.S.C., Sections 621, et seq., and particularly 621, 623 and 630, and the Fourteenth Amendment, U.S. Constitution, by the defendant Western Airlines, Inc.

2. The above discharge and termination on October 17, 1975 was and is involuntary and without good cause of any kind whatsoever. He had worked for Western Airlines for about 35 years.

3. On the date of the above mentioned illegal, wilful, wanton, intentional discharge without good cause and which was involuntary, the plaintiff Robert A. Buss was about 62-1/2 years old. He was born on January 23, 1913.

4. Mr. Buss is presently 67 years of age.

5. Mr. Buss was and is entitled to have continued his employment to the age of 70 years.

6. The purported pension plan for retirement did not and does not provide for involuntary retirement prior to the age of 70, legally and within the provisions of ADEA.

7. The purported pension-retirement plan was and is a subterfuge for discrimination on account of age and to evade ADEA.

8. The man who replaced Mr. Buss on or about November 10, 1975, after he was discharged on or about October 17, 1975, was Mr. William Morrison, and he was substantially younger than Mr. Buss, having been born on or about August 21, 1926.

9. Mr. Buss's replacement, William Morrison, was paid very substantially higher salary of about two to three times the salary that Mr. Buss was paid to do the same job.

10. Mr. Buss was not furloughed in the sense of furloughing policies and practice at Western Airlines.

11. Mr. Buss did not voluntarily retire at any time from his work at Western Airlines; he was involuntarily retired.

12. Mr. Buss has never at any time been offered reinstatement or employment of any kind with Western Airlines.

13. Mr. Buss attempted to obtain other employment after his discharge from Western Airlines, but was unable to do so.

14. There are and were not written warnings or instruction conveyed to Mr. Buss prior to his discharge notifying him

of any unacceptable conduct on his part or warning him that he would be discharged if he failed to conply with any instruction.

15. About one month after Mr. Anton Favero became senior vice president he decided to "retire" Mr. Buss.

16. There was and is no performance evaluation in writing made of Mr. Buss Prior to his discharge while he was director of flight Crew Ground Training.

17. On or about October 21, 1975, Anton Favero, the senior vice president who had ultimate authority to terminate Mr. Buss and who made that decision to terminate him, in a letter about Mr. Buss stating that he was a very satisfactory employee and that he would rehire Mr. Buss if the opportunity arose, praised him and found him to be fully competent to do his work and to have done a very satisfactory work.

18. The defendant has produced no evidence of good cause to terminate Mr. Buss for any reason, whether on account of the gasoline and oil crises of 1974, on account of any purported performance dissatisfaction or due to a need to reduce staff and/or personnel. Plaintiff contends none of these existed or exists.

19. The defendant has concealed substantial amounts of evidence and discovery in this case, including but not limited to a letter or note dated September 16, 1975 in the original sent to Robert V. Johnson, a vice president of Western who was the immediate supervisor of Mr. Buss, by senior vice president Anton Favero, the full names and locations of many persons identified in discovery and the home phone numbers of almost all of persons identified as persons with knowledge of facts herein.

The defendant has failed to specifically state which persons have knowledge of which facts in discovery.

The defendant has failed to produce full data, and particularly under oath, of salary and other benefits paid to the successors of the plaintiff Robert A. Buss.

20. Plaintiff contends that there was no particular staff reduction in his department after he left.

21. Plaintiff contends that the quality of training deteriorated substantially after he was terminated on October 17, 1975.

22. Mr. Buss contends that a presumption arose and continues that he was discharged involuntarily and without good cause due to the facts that he was paid unemployment compensation by the State of California as a result of his October 17, 1975 discharged. Plaintiff contends that

the defendant Western Airlines at no time contested his being paid unemployment compensation by the State of California, but on the contrary advised him to seek it.

23. Mr. Buss contends that his replacement-successor Mr. William Morrison was paid the following gross salary to which Mr. Buss is entitled as damages for lost salary and wages in part:

Year	Amount	
1974	55,618.42	
1975	60,824.31	
1976	69,603.96	
1977	78,349.90	
1978	88,190.00	approximately at least
1979	98,267.00	approximately at least

The defendant has failed to provide in any form, whether or not under oath, data on the gross salary of Mr. Morrison for the full years of 1978, 1978 or 1980 to date.

The defendant has failed to supply data about the other employment benefits of Mr. Morrison at any time: this includes such information as the pension plan, retirement or annuity benefits, health insurance, travel benefits, death benefits, other kinds of accident or life insurance or investment benefits.

Since the defendant has never at any teime provided under oath information concerning Mr. William Morrison's employment benefits, including gross salary and all other benefits, Mr. Buss projects and estimates that he benefits range from 25 percent to 35 percent of Mr. Morrison's salary per year.

Mr. Buss contends that the salary increase for Mr. Morrison per year has ranged from about 12.56 percent per year to about 18 per cent per year. Mr. Buss contends

that he is entitled to recovery all of the employment benefits paid and provided to William Morrison and at his rate of employment benefits to the age the age of 70 years. This includes gross salary, retirement, pension and death benefits, insurance benefits of all kinds, investment benefits, and all other benfits associated with Mr. Morrison's employment with Western Airlines.

Mr. Buss contends that his rate of pay at the time of his being involuntarily and without good cause terminated from his employment with Western Airlines on October 17, 1975 was about $31,143.88 at a base rate of $1159.38 for 26 pay periods for salary plus fringe benefits.

24. Mr. Buss contends that his involuntary discharge without cause on October 17, 1975 was intentional, wilful, malicious,

wanton and that he is therefore entitled to liquidated damages for this wilful, intentiona, malicious, wanton misconduct in discharging him involuntarily on account of his age.

25. Mr. Buss contends that he was and is qualified to be the Director, Flight Crew Ground Training and to be reinstated.

26. Mr. Buss contends that without his consent, prior to October 17, 1975, a letter was posted, executed by vice president Robert Vincent Johnson, stating Mr. Buss was "retiring" as of October 17, 1975. Mr. Buss contends that he had never applied for or told anyone that he wanted to, intended or wished to in any way retire from or leave his position at Western Airlines.

27. Plaintiff Robert A. Buss contends that he is entitled to reinstatement in his position as Director, Flight Crew

Ground Training, that of his successor and/or any comparable position.

28. Plaintiff contends that he is entitled to compensatory damages for pain and suffering for the pain, humiliation, anguish and agrivation as well as various losses from loss of the use of the salary and other employment benefits to which he was and is entitled to the age of 70 based on the salary benefits and other employment benefits paid to William Morrison.

29. Plaintiff contends that defendant has admitted the position and advocates that the plaintiff is receiving greater retirement benefits from age 62 than if he had retired at age 65 or 70.

30. Plaintiff contends that since this is an intentional tort, he is entitled to recover punitive damages in the sum of $1,000,000.00 for the wilful, malicious,

intentional, oppressive misconduct of the defendant Western Airlines. (Fifth and Fourteenth Amendments, U.S. Constitution)

31. Plaintiff contends that Arthur Kelly, chairman of the board of Western Airlines, would make the statements contained in his deposition, dated on or about August 17, 1978.

32. Plaintiff contends that Dominic Renda, previously president of Western Airlines, Inc. would make the statements contained in his deposition, taken on or about April 6, 1979.

33. Plaintiff contends that William Morrison would make the statements contained in his deposition, taken on or about March 30, 1979.

34. Plaintiff contends that donald Vena would make the statements contained in his deposition taken on or about August 16, 1978.

35. Plaintiff contends that Carl Nesbitt would make the statements contained in his deposition taken on or about August 16, 1978.

36. Plaintiff contends that Robert Jay Schnitzer would make the statements contained in his deposition, Aug. 14, 1978.

37. Plaintiff contends that Robert Vincent Johnson would make the statements contained in his deposition, taken May 31, 1978, and particularly would identify a note date September 16, 1975 as being the one referred to in his deposition and would not identify a note dated September 15, 1975 as being the one referred to in his deposition.

Plaintiff contends that the defendant is concealing a note dated September 16, 1975 and has not yet produced it. Plaintiff contends that a copy of a note dated

September 15, 1975 the defendant is attempting to hold out as one dated September 16, 1975.

38. Plaintiff contends that Dick Brown would state that Western Airlines Employees are given at least one warning orally and in writing that they will be discharged for unsatisfactory performance of work.

39. Plaintiff contends that the U.S. Department of Labor, in investigating Mr. Buss's administrative complaint, found the defendant Western Airlines, Inc., to be discriminating against Mr. Buss on account of his age in discharging him from its employment on October 17, 1975.

40. Plaintiff contends that any sums of money paid to him from third parties not involved with this lawsuit are sums of money paid from collateral sources and such payments are irrelevant and inadmissible

in this case, and not set-offs.

41. Plaintiff contends that a substantial portion of the funds paid to Mr. Buss were and are his property at all times and were a form of reimbursement to him of his own moneys and may not be used as set-offs against him.

42. Plaintiff contends that a prima facie case of age discrimination in employment has been presented and that the defendant has no evidence to refute it.

43. Plaintiff has sought to contend that Western Airlines has engaged in a pattern and practice of discrimination on account of age, but has been refused discovery sufficient to be able to complete the complicated statistical studies necessary as provided for in McDonnell Douglas Corp. v. Green, 411 US 792, 36 L.Ed.2d 668 (1973). Plaintiff contends that the defendant

has concealed this data and information and that an inference and presumption arise as a result that the defendant has engaged in a pattern and practice on account of advancing age of discrimination against its employees.

44. Plaintiff contends that his discharge was not based on its legitimate business consideration, and that any excuses given by the defendant for discharging him are mere pretext for discrimination.

45. Plaintiff contends that his life expectancy is well beyond the age of 70 years.

46. Plaintiff contends that defendant's various defenses are inherently inconsistent and in conflict. Plaintiff denies the contentions of the defendant generally and specifically.

47. Plaintiff contends that he filed an age discrmination complaint against Western Airlines on November 17, 1975 regarding his involuntary termination, from his employment on or about October 17, 1975 with the Fair Employment Practice Commission, State of California, Agriculture and Services Agency.

48. Plaintiff contends that he also filed an age discrimination complaint against Western Airlines by mailing it on December 30, 1975, to the U.S. Department of Labor, Employment Standards Administration, in the form of a notice of intent to file and bring suit against Western Airlines, which was acknowledged as received by the Assistant Area Director Robert W. Terwilliger on our about January 12, 1976.

49. Plaintiff contends that conciliation efforts took place and that the U.S.

Department of Labor attempted to pursuade Western Airlines to reinstate Mr. Bu ss and to pay him his lost salary and benefits, without success.

50. Plaintiff contends that he exhausted all administrative and conciliation requirements and that the United States District Court has jurisdiction in the above entitled matter.

51. Plaintiff contends that he is entitled to recover reasonable attorneys' fees and that he counsel have been requiree to expend at least 2000 work hours and according to proof additionally and have sustained at least approximately $12,000.00 in expenses and costs of litigation herein.

Plaintiff contends that he is entitled to reasonable attorneys' fees for both trial and appellate level work and the costs and expenses of being required to proceed

at all levels.

52. Plaintiff incorporates herein by reference as though fully set forth the contentions of law attached hereto.

53. Plaintiff contends that any proposed or offered items of purported evidence and or proposed witnesses not identified fully in discovery and pretrial, including their full names, work and home addresses and phone numbers, be excluded from evidence and that a presumption arises that any testimony or other evidence each might give or supply is adverse to the defendant.

54. Plaintiff incorporates herein by reference as contentions of fact those statements contained in his Section III hereof containing a proposed statement of admissions of fact. Plaintiff moves that they be deemed admitted by the defendant Western Airlines.

55. Plaintiff reserves the right to augment, revise or otherwise alter this pretrial statement as he deems necessary and proper.

56. Plaintiff once again moves for the entry of a default for failure of the defendant to provide discovery as sought over any extended period of time and contained in the files and records herein.

57. Plaintiff contends that he is entitled to interest on any damages awards made herein and the costs and expenses of ligation from the date of his wrongful discharge on October 17, 1975, at the rate of ten percent per annum.

58. Plaintiff contends that he is entitled to amend to name any corporation or other business entity into which Western Airlines, Inc., may merger or become consolidated with or whoever the successor

designated proper defendant(s) is(are) as provided by law should Western Airlines cease to exist.

59. The plaintiff Robert Buss contends that he was throughout 1975 and has at all times relevant herein been duly and fully qualified to be Director, Flight Crew Ground Training the position which his successor William Morrison held and/or any comparable position since he took on the duties and responsibilities of that job.

DEFENDANT'S CONTENTIONS OF FACT

1. Defendant Western Air Lines, Inc. ("Western") is a Delaware corporation, authorized to do business and doing business in the County of Los Angeles, State of California, at all times herein mentioned. Defendant is an employer within the meaning of 29 U.S.C. §630(b). Western is a commercial

airline carrier certificated by the Civil Aeronautics Board.

2. Plaintiff was first employed by defendant on February 15, 1940, and became enrolled in defendant's Retirement Income Plain ("Retirement Plan") on or about July 1, 1952, for non-contract employees.

3. For purposes of computing retirement benefits and seniority, the above dates were used by defendant.

4. The last day worked by plaintiff was October 17, 1975. Plaintiff was told in or about September of 1975 that he was being relieved of his duties, but that he would receive ten weeks salary until January 23, 1976, as well as accrued vacation pay.

5. Plaintiff applied for "early retirement" under defendant's Retirement Income Plan on January 26, 1976.

6. Plaintiff received as part of that retirement income plan, a lump sum payment in the amount of $17,469.39.

7. Plaintiff receives under the Retirement Income Plan of defendant the monthly payment of $921.67 per month from February 1, 1976, and each month thereafter. Plaintiff has received payments in that amount since February 1, 1976.

8. Plaintiff was Director of Ground Training - Flight from 1971 to June 25, 1974, when his title was changed to "Director-Flight Crew Ground Training."

9. Plaintiff was "Director-Flight Crew Ground Training" from June 25, 1974 to his furlough on October 17, 1975.

10. Prior to 1971, plaintiff was "Assistant to Vice-President, Flight Operations", who was H. W. Coward.

11. Plaintiff filed a notice of intent to sue with the Department of Labor on or about January 12, 1976.

12. Plaintiff's annual salary at the time of his retirement was approximately $30,004.00.

13. Plaintiff was informed he was to be placed on furlough as Director-Flight crew Ground Training in or about September of 1975. Plaintiff was informed at that time that his separation from Western was permanent.

14. Plaintiff was counselled by A. B. Favero, Senior Vice President, Operations, and Robert V. Johnson, Vice President Flight Operations, on the utilization of his time and that of the employees under his supervision on many occasions from April 1974 until he was furloughed in 1975.

15. Plaintiff refused to qualify himself to do direct training in the flight school as requested by both Messrs. Favero and Johnson.

16. Mr. Richard McDonald, a manager under Mr. Buss was also instructed to qualify himself to train in the flight school program, and did so qualify, as did other employees.

17. Plaintiff refused, in a memorandum dated June 27, 1974, to furnish A. B. Faveero either with "instructor hours available" or "instructor hours utilized," as he had been requested to do. This information was necessary for management to make appropriate personnel decisions.

18. Plaintiff was counselled by Robert V. Johnson to furnish the information to Mr. Favero which was requested by him in a timely fashion, but failed and refused to

do so.

19. Plaintiff on more than one occasion complained to Robert V. Johnson, his supervisor, about responding to requests for information regarding the utilization of personnel in his department.

20. Messrs. Favero and Johnson made it clear that they believed plaintiff's department to be under-utilizing its personnel, on several occasions. Nevertheless, plaintiff did not make any efforts to reduce the number of employees under his supervision until ordered to do so by his superiors.

21. During the period April 1974-1975, some of the personnel under plaintiff's supervision were placed on furlough or transferred to other divisions or departments for reasons of ecomony.

22. Due to a shortage of fuel, and the Arab oil embargo, flight operations for defendant were curtailed during the 1974-75 period. Many of defendant's employees in all departments of the company had to be placed on furlough or terminated, for reasons of economy.

23. At the time of plaintiff's separation from Western, the Company had a policy of furloughing management employees on the basis of overall performance evaluation in which the least effective (lowest performance ratings) management employees were those furloughed first. Plaintiff's overall evaluation by his superiors was that his performance as a director of the flight crew training school was grossly inefficient and ineffective.

24. The employee who replaced plaintiff as director of the flight crew training

school was able to manage and operate the school and its employee instructors with one-third fewer employees than those supervised by plaintiff, while still training substantially the same number of pilots as previously.

25. The primary responsibilities and duties of the Director-Flight Crew Ground Training was to be responsible to the Vice President-Flight Operations, for all (Federal Aviation Administration) required recurrent, initial and transitional ground school and flight simulator training of pilot personnel.

26. Western's Retirement Income Plan for non-bargaining employees ("Retirement Plan") was and is a bona fide retirement or pension plan, and was not instituted as a subterfuge to evade the purposes of the ADEA.

27. The Retirement Plan has uniformly been applied so that retirement at the normal retirement date has always been the case. The Retirement Plan provided in October of 1975 for a normal retirement date of age 65.

28. Plaintiff's employment would have ceased on February 1, 1978, had he not been terminated in October of 1975, as the provisions of the Retirement Plan would have forced his retirement on that date.

29. Plaintiff voluntarily enrolled in the Retirement Plan and continued making contributions thereto while employed at Western.

VII. EXHIBITS TO BE OFFERED AT THE TRIAL

The plaintiff sets forth his exhibits to be presented and offered into evidence at trial as contained in Exhibit "A" hereto.

The plaintiff moves that no exhibits of the defendant be permitted to be introduced at trial. However, if this motion is overruled, the plaintiff attachs a list of exhibits in Exhibit "B" attached hereto, with his objections.

Plaintiff wishes to notify this Court that he does not have any recollection, through his counsel, of having ever been displayed the following exhibits nor have they been idenfied in discovery: Defendant's Exhibit List Items D, F, G, H, J, T, V

A

Plaintiff reserves the right to add to, alter or amend his objections to exhibits at the time of trial or prior thereto.

Plaintiff specifically objects to and does not consent to or approve in any way the inclusion of exhibits which were not

produced in discovery and/or pretrial production under Local Rule 9 and F.R.Civ.P., Rule 16, and moves that they be excluded from introduction into evidence at any trial or that the jury be instructed to draw adverse inferences due to the fact that they have been withheld in discovery, and that a presumption of concealment and that the information contained in same is adverse to defendant.

VIII. ISSUES OF LAW WHICH REMAIN TO BE LITIGATED UPON THE TRIAL

Except as to those statements contained in Sections I, II and III hereinabove, the following issues of law remain for this Court's consideration and to be litigated, to-wit:

PLAINTIFF'S CONTENTIONS OF LAW

Comes now the plaintiff Robert A. Buss and sets forth the following contentions of and memorandum of law, pursuant to United States District Court for the Central District of California Local Rules 9 and 12, to-wit:

1. Plaintiff has been discriminated against by the defendant on account of his age by being illegally, wilfully, intentionally, wantonly, maliciously and oppressively discharged due to his advancing age from his employment with Western Airlines on or about October 17, 1975. He seeks damages for these discriminatory acts pursuant to the provisions of Title 29, U.S.C., Sections 621, et seq., and particularly Title 29 U.S.C., Sections 621, 623, 626 and 630, commonly known as the Age Discrimination in Employment Act; Title

42 U.S.C., Sections 1981 through 1988; the Fair Labor Standards Act of 1939, as amended, Title 29, U.S.C., Sections 201, et seq. and the Fourteenth Amendment, U.S. Constitution. (Laugesen v. Anaconda Company, 510 F.2d 307, 6th Cir., 1975; Bishop v. Jelleff Associates, 308 F.Supp. 579, D.C., 1974; Schultz v. Hickok Mfg. Co., 358 F.Supp. 1208, N.D.Ga., 1973)

2. Plaintiff contends that he has made out and the law currently requires that he establish the following four factors to make out a prima facie case of discrimination in employment:

a) That the plaintiff was at the time of his discharge and is within the protected group of 40 to 70 years of age;

b) That he was demoted, discharged or not hired or rehired;

c) That he was replaced by a younger

person or persons.

d) That he was and is qualified to do the job from which he was discharged.

3. Plaintiff contends that he need show only that his age was one of the motivating, causal factors in his discharge from his employment. (Bishop v. Jelleff Associates, 308 F.Supp. 579)

4. Plaintiff contends that the discharge of an employee who is older in order to replace him with a younger person is a per se form of discrimination.

5. Intentional discharge of an employee on account of his age is a form of bad faith discharge without cause which entitles the illegally discharged employee to liquidated damages under Title 29 U.S.C., Section 626.

6. A lawsuit for damages and injunctive relief for age discrimination in employment is a suit sounding in tort. (Tillman

v. Wheaton-Haven Recreation Asso., 517 F.2d 1141, 4th Cir.,1975)

7. The plaintiff is entitled to a trial by jury on all phases of this case. Plaintiff sought a trial by jury, which was not opposed by the defendant to the best of plaintiff's knowledge in any way.

8. The issue of "wilfulness" is an issue of fact for the jury. (Devitt and Blackmar Jury Instruction, No. 16.12 (2nd Ed.)

9. "Wilfulness" is an act done voluntarily, intentionally and with the specific intent to do something the law forbids.

10. The defendant has waived any objections to a trial by jury.

11. Plaintiff is entitled to recover compensatory damages for pain and suffering and for other economic losses, including loss of benefits and investment value

of funds.

12. Where a defendant conceals or otherwise secretes or destroys evidence, a presumption arises against it that said evidence and information is adverse to the position of the defendant; the jury may draw an inference in favor of the plaintiff and against the defendant from such concealed, secreted evidence and information that it is guilty of discrimination on account of age. (Devitt and Blackmar, Jury Instructions, 2nd Ed., No. 11.19)

13. Plaintiff incorporates herein by reference as though fully set forth those contentions contained in the contentions of fact attached herein.

14. Plaintiff incorporates herein by reference as though fully set forth the files and records herein, and particularly the Local Rule 3(1) stipulation filed herein

on August 15, 1979 stating the plaintiff's contentions as to issues of discovery.

15. Plaintiff contends that payments made to him of his own money, of an annuity and/or from any third party and source are collateral sources and may not be set off against any damages herein. (Helfend v. Southern California Rapid Transit Dist. 2 Cal.3d 1

16. Plaintiff is entitled to recover reasonable attorneys' fees, including those for work at the appellate level, and costs and expenses of litigation. (Title 29, U.S.C., Section 626(b); Title 29 U.S.C., Section 216(b); Cleverly v. Western Electric, 594 F.2d 638) This is mandatory where the plaintiff prevails.

17. Plaintiff is entitled to seek recovery based on projected inflationary trends on the gross salary and benefits

to which he would be entitled as a result of his employment. (U.S. V. English, 521 F.2d 63, 9th Cir.)

18. Punitive damages are available in an age discrimination case. (Murphy v. American Motors, 410 F.Supp. 1403)

19. Compensatory damages for pain and suffering are available in age discrimination in employment cases as well as other discrimination cases. (Title 29, U.S.C., Sections 621, et seq.; Murphy v. American Motors, 410 F.Supp. 1403)

20. The defendant had no authority to involuntarily retire the plaintiff prior to the age of 70 as it did. Even the purported pension plan provided for retirement by the plaintiff only on a voluntary basis prior to age 65. (29 U.S.C.§623)

21. An employer discriminates against his employees on account of age where

benefits are reduced in value the longer that an employee works for an employer the older he becomes. (Title 29 U.S.C., Sections 621, et seq.)

22. Where an employer pays an older employee substantially lower salary than a younger man who replaces him and also states that the older the plaintiff becomes and the longer he is employed the less his benefits will be, age discrimination in employment exists per se. (Title 29 U.S.C., Section 621, et seq.)

23. Any facts, documents or persons not full identified and whose home location and address have not been supplied should be excluded, if offered by the defendant for any reason, for failure to supply such information in discovery. (Federal Rules of Civil Procedure, Rules 26 through 27; NFL V. Metro. Hockey Club, 49 L.ed.2d 747;

Von Brimer v. Whirlpool, 536 F.2d 838)

24. Plaintiff contends that the district court has jurisdiction to enter a judgment against the defendant on all of the bases set forth the above.

25. When the plaintiff has made out the points set forth in contention of law no. 2 as the plaintiff asserts he has been able to do herein, the burden of proof and persuasion shifts to the defendant who must rebut the prima facie case of age discrimination in employment by establishing a legitimate non-discriminatory explanation for its conduct, that is, that it was not a mere pretext for age discrimination.

26. All pension plans, including the one to which Mr. Buss has belonged as an employee of Western Airlines, must be administered by an adminstrator who is wholly independent and separate from the employer.

Prudential Life Insurance Company has administered the plane to which the plaintiff belonged. Payments of any kind made by it are from an independent collateral source by law, under ERISA.

27. Laches is not a defense to an at law action. No statute of limitations bars the plaintiff from recovery herein. This action and all of the conciliation and notice of intent to sue prerequisites have been satisfied herein as a matter of law.

28. Plaintiff reserves the right to augment, amend and otherwise alter and add to this pretrial statement.

29. Plaintiff objects that the defendant has failed to supply him with necessary discovery, including particularly damages information necessary for him to have to present at trial.

30. Plaintiff estimates a trial length

of about 15 trial days.

31. Plaintiff contends that he did not at any time voluntarily retire.

32. Plaintiff contends that any issue concerning a trial which the defendant wishes to raise, although it has waived any such objections, and such issue raising is not appropriate therefore, should be included in the defendant's contentions of law.

33. Plaintiff contends that the defendant has failed to comply with orders it sought for the limitation of discovery through discovery scheduling after a showing of good cause only. Defendant was obligated to have filed any discovery schedule for any discovery sought on or about August 21, 1978. That time has long past. This serious delay of about two years and defendant's own failure to provide

discovery necessary for plaintiff to be able to present his case estops the defendant from seeking any further discovery, having failed to comply with the time limits it, itself, sought to impose upon the lititants herein. (Due Process of Law and Equal Protection of the Laws as guaranteed by the Fifth Amendment, U.S. Constitution)

34. Plaintiff contends that the defendant is limited in doing discovery on the opinions of experts and the bases for them to discovery it has already done and that its only right was to have propoun ded interrogatories under F.R.Civ.P., Rule 16(b), not to depose experts. Defendant did not comply with a time limit for iling a discovery schedule and has waived an opportunity to do any further discovery for any reason herein.

34. Defendant has raised issues not

presented as defenses in its responses to discovery, such as that the "normal retirement" date is uniformly enforced by Western Airlines; the plaintiff moves to strike this contention as untimely and as a surprise to the plaintiff.

DEFENDANT'S CONTENTIONS OF LAW

1. Plaintiff has the burden of proving the following facts in order to establish a prima facie case of age discrimination: (1) That he was within the protected age group; (2) that he was discharged against his will; (3) that he was satisfactorily performing the duries of his job; and (4) that he was replaced by a younger person not within the protected age group. Wilson v. Sealtest Foods, 501 F.2d 84 (5 Cir. 1974); Price v. Maryland Casualty Co., 561 F.2d 609 (5th Cir. 1976).

2. Once plaintiff has made a prima facie showing of age discrimination, defendant has the burden of rebutting the inference of discrimination by articulating a legitimate non-discriminatory motive for its treatment of plaintiff. If defendant makes this showing, plaintiff must then show that defendant's justification is a pretext for discriminatory action. Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Marshall v. Westinghouse Electric Corp., 582 F.2d 966 (5 Cir. 1978).

3. Plaintiff has the burden of proving that his age was a substantial and determinative factor and a determining factor in defendant's decision to terminate his employment. Laugeson v. Anaconda Co., 510 F.2d 307 (6 Cir. 1975)

4. Defendant's conduct with respect to plaintiff was reasonable and plaintiff

is not entitled to liquidated damages for a willful violation of the Act. The issue of willfulness is a question of law for the Court to determine. Rogers v. Exxon Research & Engineering Co., 404 F.Supp.324, (D.N.J. 1975), reversed on other grounds, 550 F.2d 854 (3 Cir. 1977).

5. Should plaintiff prove liability, he is entitled to damages of restitution in an amount equal to the wages and other benefits lost as a result of defendant's unlawful conduct. 29 U.S.C. §626(c).

6. Defendant is entitled to offset plaintiff's pension plan benefits received and other benefits against any recovery of lost wages or other benefits by plaintiff.

7. Plaintiff is not entitled to exemplary or punitive damages for a violation of the ADEA, even if such violation is deemed to be willful.

8. Plaintiff is not entitled to compensatory damages under the ADEA for psychological or emotional injury suffered as a result of defendant's violation of the ADEA.

9. Plaintiff is entitled to attorneys' fees, in the discretion of the Court, if a violation of the ADEA is shown to have been committed, which as resulted in damage to the plaintiff.

10. Defendant is entitled to assert ehe defense of laches in mitigation of plaintiff's claim for lost wages and other compensatory damages, for plaintiff's willful failure to diligently prosecute this action.

IX. OTHER MATTERS

A. At the specific request of the defendant, and over the plaintiff's objections

that these below listed contentions should be included in the pretrial statement of defendant's contentions of law and without the plaintiff's consent or approval in any way, the following is set forth:

1. The parties disagree as to the time estimated for trial.

Plaintiff estimates a trial length of at least approximately 15 trial days.

Defendant estimates six to eight trial days.

2. Defendant contemplates law and motion proceedings regarding plaintiff's witnesses listed for trial, and in particular, expert witnesses.

3. Defendant will seek further responses to its interrogatories to plaintiff, and also conduct discovery at plaintiff's experts and the basis for their opinions. Also defendant wants copies of all trial

exhibits and an opportunity to depose witnesses not identified in plaintiff's discovery responses.

4. Defendant contests plaintiff's right to a jury trial on all of the issues listed herein, and relies on Lorillard v. Pons, 434 U.S. 575 (1978) to guide this Court.

B. Plaintiff's Objections and Reservations to the Above Statements of Defendant:

1. Plaintiff is still awaiting the receipt of information on the issues of damages from the defendant, which information was ordered by this Court in an order dated August 17, 1978, and promised by the defendant, in full, in lieu of formal depositions pursuant to F.R.Civ.P., Rule 30(b)(6) and anticipates that this information will result in further clarification of the damages contentions presented

herein and may, depending on the contents thereof, modify same. If any modification is occasioned by the contents of the information to be supplied by the defendant the Court will be apprised of same.

By way of a hand-written document communicated to plaintiff's counsel at August 6, 1980 meeting concerning the pretrial conference statement and after plaintiff's proposed pretrial conference statement was lodged with the Court, the defendant has indicated that it intends to seek further responses to unidentified interrogatories of defendant apparently propounded to plaintiff, that defendant wishes to conduct unspecified discovery with respect to plaintiff's experts and the bases for their opinions and that defendant wants copies (apparently at plaintiff's expense) of all trial exhibits which have

been shown to defendant pursuant to Local Rule 9. Defendant has also indicated that it wishes to have the opportunity to depose unspecified witnesses on unspecified dates whose identities have not previously be disclosed and particularly in conformity with a discovery schedule.

Plaintiff objects to each of defendant's requests aforementioned as being contrary to the provisions of Federal Rules of Civil Procedure, Rule 16 and on the further grounds that the requests are untimely, and highly prejudcal to plaintiff.

With respect to any discovery concerning plaintiff's experts and the bases for their opinions, plaintiff's counsel and defendant's counsel have stipulated that the defendant will be provided with the computations of plaintiff's experts once information upon which computations

could be made have been supplied by the defendant fully and completely. Although defendant's attorneys agreed to supply said information well in advance of the pretrial conference date they have not done so. Nonetheless, in the spirit of mutual disclosure of information plaintiffs remain ready and willing to abide by the agreement to provide calculations within about a week, once the defendant has fully and completely complied with its obligations to disclose the damages discovery.

However, the plaintiff objects to any further discovery by the defendant, and particularly objects that the defendant is seeking discovery beyond the time limits it sought itself and beyond F.R.Civ.P., Rule 26.

Plaintiff seeks to take a continued deposition of Robert Vincent Johnson con-

cerning a hotly disputed note and whether a copy of a note produced since he identified the existence of one is indeed the note he described in that deposition. Plaintiff contemplates further discovery on damages as he deems necessary and proper as damages information is supplied to him by the defendant. If plaintiff's petition for a writ is granted or there is a change in the rulings on discovery herein, in addition plaintiff wishes to continue pursuant discovery sought. Plaintiff may wish to depose Bruce Wallace, a belatedly identified Rule 30(b)(6) witness. Plaintiff may wish to add to his list of witnesses based on the above discovery, and reserves the right to do so.

X. CLOSING PARAGRAPH

The foregoing statements having

been presented by the plaintiff, and the foregoing issues of law and fact having been specified by the plaintiff as remaining to be litigated, this order shall supplement the pleadings and govern the course of the trial herein. The plaintiff is entitled to modify the foregoing as he deems necessary and proper.

IT IS SO ORDERE.

Dated:

_____
U.S. DISTRICT JUDGE

APPROVED AS TO FORM AND CONTENT by

Plaintiff Robert A. Buss.

Dated: August 7, 1980 (with reservations JCL)

/s/
Joan Celia Lavine
JOAN CELIA LAVINE, Attorney for
Plaintiff Robert A. Buss

APPROVED AS TO FORM AND CONTENT by Defendant Western Airlines, Inc., a corporation.

Dated: August 7, 1980

DARLING, HALL, RAE AND GUTE
PAUL L. GIANNINI
Attorneys for Western Airlines, Inc.

By: _____
PAUL L. GIANNINI

EXHIBIT "A"

ROBERT A BUSS V. WESTERN AIRLINES, INC.,
Case No. CV-77-142-TJH

EXHIBIT LIST OF PLAINTIFF

Description	Date Marked	Date Admitted	Objections
1. Letter stating Mr. Buss would retire as of October 17, 1975, signed by Robert V. Johnson (no date)			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery
2. Letter praising Mr. Buss's performance, signed by Anton Favero, senior vice president of Western Airlines, dated October 21, 1975			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery
3. Files and records of the U.S. Department of Labor concerning age discrimination complaint of Mr. Buss and investigation of same, finding Mr. Buss had been discriminated against on account of his age by Western Airlines			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
4. Files and records and documents of the California Department of Employment Development Department concerning October 17, 1975 discharge and comp.			Hearsay, relevance Rules 403, 703, 704, 801, not produced in discovery
5. Payroll records of William Morrison			Hearsay, relevance Rules 403, 703, 704, 801, not produced in discovery.
6. Payroll sheet prepared by Pauline Davis showing Mr. Morrison's gross salary and per diem starting in 1974 (undated)			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
7. General administrative manual of Western Airlines for 1973			Hearsay, relevance, Rules 403, 703, 704, 801, not provided in discovery.
8. General administrative manual of Western Airlines for 1974.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.
9. General administrative manual of Western Airlines for 1975.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.

Description	Date Marked	Date Admitted	Objections
10. General administrative manual of Western Airlines for 1976.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.
11. General administrative manual of Western Airlines for 1977.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
12. General administrative manual of Western Airlines for 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
13. General administrative manual of Western Airlines for 1979.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
14. General administrative manual of Western Airlines for 1980.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
15. Confidential memorandum concerning furlough policies of Western Airlines, dated 8/24/74.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
16. A copy of a note dated September 15, 1975, initialed purportedly by Anton Favero.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
17. The original note dated September 15, 1975, initialed purportedly by Anton Favero.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
18. The original and copies of note, dated September 16, 1975 initialed by Anton Favero and sent to Robert V. Johnson telling Mr. Johnson to "retire" Mr. Buss.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
19. The personnel files of Robert A. Buss of Western Airlines.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
20. The yearly, annual shareholder's reports published by Western Airlines from the year 1973 to the present time of the trial.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
21. The quarterly statements prepared by Western Airlines for its shareholders and published.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
22. The depositions of Robert A. Buss taken herein and the attachments thereto.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
23. The depositions of Arthur Kelly, taken August 17, 1978 herein.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
24. Checks disbursing funds from annuity and pension plan, starting in May, 1976, by Prudential Life Insurance Company to Robert A. Buss.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
25. Pension and retirement plan to which William Morrision has belonged between November 10, 1975 and date of trial.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
26. Pension plan folders and statements as to non-bargaining employees of Western Airlines, which applies to Robert A. Buss			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
27. The deposition of Robert J. Schnitzer, taken August 14, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
28. The deposition of Robert V. Johnson taken May 31, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
29. The deposition of of Anton Ben Favero, taken June 1, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
30. Western Airlines articles of incorporation or corporate charter.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
31. Western Airlines by-laws			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
32. Western Airlines corporate minutes, executive committee, shareholder and board of directors from 1970 to the present time.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
33. The files and records of Buss v. Western Airlines, U.S.D.C. (C.D.Cal.) CV-77-124			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
34. The files and records of Buss v. U.S.D.C. (C.D.CAL.) U.S.C.A. (9th Cir.) 78-3174			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
35. Files and records of Western Airlines v. Union Oil Co., U.S.D.C. (C.D.Cal.)CV-75-1351-JWC and particularly the complaint and interrogatories and responses to same.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
36. Employee's Annual Statement concerning Retirement Income Plan for years 1971 through present time.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
37. Document production, pursuant to response filed herein on August 29, 1977.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
38. Computor print-outs of Robert'Buss's pension plan information from December 12, 1975 print-out			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
39. Prudential Notice to Recipients of Taxable Lump Sum Distributions, etc.			Hearsay,relevance, Rules 403, 703, 704, 801 not produced in discovery
40. Letter dated February 1, 1976 from Prudential to Robert A. Buss concerning annuity.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
41. Prudential letter, dated May 5, 1976, to Robert A. Buss showing return of employee contributions ($17,469.39)			Hearsay,relevance, Rules 403, 703, 704, 801 not produced in discovery
42, Los Angeles Magazine, September, 1977 article "Down to Basics", by Tom Link, starting page 110.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
43. SEC Westen Airlines filing, Form S-7, August 10, 1977.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
44. Quarterly Shareholder statements since 1973 of Western Airlines.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
45. January 28, 1977 article, Valley News, "Western will buy 7 jetliners.			Hearsay, relevance, Rules 403 703, 704, 801 not produced in discovery.
46. Forbes, October 15, 1976, article "Alone in the Cockpit", page 63.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
47. Letter, dated January 23, 1976, to Robert A. Buss from Bruce Wallace.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
48. Summary Annual Report for the Plan Year August 1, 1975 to July 31, 1976 of Westenr Airlines Group Insurance plan, etc.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
49. Copies of pilot's license of Robert A. Buss.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Discovery	Date Marked	Date Admitted	Objections
50. Letter of May 25, 1973, re New Minimum Retirement Income and 1972 Annual Statement			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
51. Letter of Brig Whittaker, undated			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
52. Interoffice Correspondence to Robert A. Buss dated 8-30-74 re retirement income plan from Pat Ryan			Hearsay, relevance, Rules 403, 703,704, 801 not produced in discovery
53. Letter of September 3, 1974 re Annual Statement for Management, Administrative and Technical Employees from Dan Zaich.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
54. Letter of January 27, 1975 to all management and administrative & Technical employees from Dominic Renda.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
55. Letter of May 25, 1976 to participants in Western Airlines Retirement Income Plans, etc.			Hearsay, relevance, Rules 403 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
56. Receipt, dated May 16, 1978 from Paul L. Giannini in regards to the items number 50 through 55.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
57. May, 1980 edition of newspaper, Flight Times, published by Western Airlines.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
58. March, 1976 Flight Times			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

EXHIBIT "B"

LIST OF EXHIBITS OF DEFENDANT, WESTERN AIR LINES, INC.

EXHIBIT	Plaintiff's Objections	DESCRIPTION
A	not shown to P., irrelevant to successor based damages and as of time of discharge; no foundation; not complete documentation of plans of Western Airlines. (Rules of Evid., Rule 106)	Western Air Lines Retirement Income Plan for Non-Bargaining Employees, as amended through February 1, 1976.
B	same objection as Ex. "A"; haarsay not best evidence, no foundation, incompetent, no qualified opinion, irrelevant; P. entitled to access to all of documentation	Summary of Western Furloughs and Discharges of Los Angeles Management Employees, May 1, 1974 - December 31, 1977.
C	same objections as to Exs. A and B	Summary of Western Furloughs and Discharges at Flight Ground School Employees, May 1, 1974 - December 31, 1977.
D	same objection as to Exs. "A" and "B"	Memoranda regarding merit increases for Western Management Employees, 1975, 1976, 1977 and 1978 (Rebuttal only).

EXHIBIT	Plaintiff's Objections	DESCRIPTION
E	irrelevant, incompetent, not qualified to testify as expert (Schnitzer); as objections as to Exs. A. and B.	Calculation of Age 65 Retirement Benefits for Robert Buss and Present Value of Early and normal Retirement Benefits, as prepared by Robert Schnitzer (Rebuttal)
F	Same objections as Exs. A,B and E	Western Air Lines Summary of Fuel and Labor Costs, 1975 versus 1974.
G	Same objections as Exs. A,B and E	Information Reports furnished by Western to Air Transport Association, Economics and Finance Department, Summary of Employees on payroll, Furlough, Aircraft removed from service, for 1974-75.
H	Sam objections as Exs. A,B and E	Interoffice Memorandum, January 28, 1975, A. B. Favero to R.V. Johnson.
I	Same objections as Exs. A,B and E.	Memorandum, June 27, 1974, R.A. Buss to A.B. Favero (2 pages).
J	am not sure whether this was shown to same objections as Exs. A,B, and E	Memorandum, June 13, 1974, R. A. Buss to A. B. Favero.

EXHIBIT	Plaintiff's Objections	DESCRIPTION
K	Same objections as Exs. A,B and E	Application for Early Retirement Benefits, R. A. Buss, February 1, 1976.
L	Same objections as Exs. A,B and E	Selection of forms of Pension Benefits, R.A. Buss, January 266, 1976, Retirement Inc. Plan.
M	Same objections as A,B, and E, Exs. above	Selection of Optional Variable Contributions, R. A. Buss, January 26, 1976 Retirement Inc. Plan.
N	Same objections as Exs. A,B, and E	Prudential Insurance Co., Notice of Retirement Status, R. A. Buss, January 26, 1976.
O	Same objections as Exs. A,B, and E.	Letter, may 5, 1976, David L. Kostenbader to R. A. Buss, with enclosure.
P	cannot identify, therefore objections as in Exs. A,B, and E	Organization Chart, June 1, 1974 - Western Air Lines Pilot Ground School.
Q	hearsay, irrelevant	Plaintiff's Response to Defendant's Interrogatories, Response No. 2, dated August 28, 1975.

EXHIBIT	Plaintiff's Objections	DESCRIPTION
R	Same objections as Exs. A,B, and E	Western Payroll Notice, Form G-16, for Robert A. Buss, October 9, 1975.
S	am not sure whether this is what Mr. Buss has shown as furlough procedure	Memorandum to Corporate Officers, dated August 28, 1974, from Thomas E. Hall, Furlough procedure (4 pages).
T	Same objections as Exs. A,B, and E	Western Payroll Notice, Form G-16, for Robert Buss, dated April 16, 1976.
U	Same objections as Exs. A,B, and E.	Organization Chart, Western Pilot Ground School, January 1, 1976.
V	Same objections as Exs. A, B, and E vague and unclear	Flight Operations Manual, Western Air Lines, Duties of Director, Flight Operations Training.
W	Same objections as Exs., A,B and E. am not sure whether this is a document prepared by Mr. Buss	Ground School Instructors Utilization Chart Summary, January-December, 1974.

EXHIBIT	Plaintiff's Objections	DESCRIPTION
X	irrelevant and incomplete; same objections as Exs. A,B, and E	Western General Administrative Manuarl (GAM), March 1, 1977, Page 55.
Y	Same objections as Exs A,B,E and X	Western GAM, June 1, 1976, Page 51.
Z	Same objections as Exs. A,B,E and X	Western GAM, June 16, 1975, Page 51.
AA	Same objections as Exs. A,B,E, and X	Western GAM, February 1, 1972, Page 15. Organization Chart, Flight Operations.
BB	hearsay, irrelevant, not best evidence conclusionary, not properly qualified to express expert opinions hearsay on hearsay; same objections as Exs. A,B, and E, and X	Western Air Lines, Annual Report, 1976

APPENDIX L

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HON. TERRY J. HATTER, JR., JUDGE PRESIDING

ROBERT A. BUSS, PLAINTIFF, vs. WESTERN AIRLINES, DEFENDANT.	)	CV 77-124-TJH

REPORTER'S TRANSCRIPT

OR PROCEEDINGS

DATE: MONDAY, AUGUST 11, 1980

PLACE: LOS ANGELES, CALIFORNIA

PATRICIA FERRIER
OFFICIAL REPORTER
312 N. SPRING STREET
LOS ANGELES, CA 90012
(213) 628-8423

APPEARANCES:

FOR THE PLAINTIFF:

JOAN LAVINE
ATTORNEY AT LAW

FOR THE DEFENDANT

PAUL, RAE & GUTE
BY: PAUL GIANNINI
ATTORNEY AT LAW

ALSO PRESENT:

MARK ROBINSON
ATTORNEY AT LAW

MONDAY, AUGUST 11, 1980, LOS ANGELES, CALIFORNIA 10:25 A.M.

THE CLERK: ITEM TWO CIVIL ACTION, 77-124, BUSS VERSUS WESTER AIRLINES.

COUNSEL, PLEASE MAKE YOUR APPEARANCES.

MS. LAVINE: GOOD MORNING, YOUR HONOR, JOAN LAVINE APPEARING ON BEHALF OF THE PLAINTIFF.

AND MAY I INTRODUCE TO YOUR HONOR MARK ROBINSON--

THE COURT: YES.

MS. LAVINE: -- ON BEHALF OF THE PLAIN_ TIFF.

THE COURT: MR. ROBINSON.

MR. GIANNINI: GOOD MORNING, YOUR HONOR.

PAUL GIANNINI OF DARLING, PAUL, RAE AND GUTE FOR DEFENDANT.

MS. LAVINE: MAY I INDICATE FOR THE RECORD, YOUR HONOR, THAT MR. BUSS IS SENT IN COURT ALSO.

THE COURT: YES.

MS. LAVINE: MR. ROBINSON WILL BE SUBSTITUTING INFORMALLY.

WE ARE JUST EXECUTING THE FORMS HERE IN COURT.

THE COURT: YES, I UNDERSTAND THAT.

MS. ROBINSON: THANK YOU, YOUR HONOR.

THE COURT: YES.

THANK YOU, MR. ROBINSON.

THE COURT: MR. GIANNINI, I HAVE RECEIVED YOUR AFFIDAVIT FILED TODAY.

I BELIEVE IT VERY WELL MAY BE MOOTED WITH MR. ROBINSON COMING INTO THE MATTER.

MR. GIANNINI: I WOULD LIKE TO HEAR FROM MR. ROBINSON ON THAT, YOUR HONOR.

IF HE IS GOING TO BE TRIAL COUNSEL THEN I PROPOSE THAT WE MEET AS SOON AS POSSIBLE AND GET THIS PRETRIAL ORDER.

THE COURT: ALL RIGHT.

MR. ROBINSON, WHAT ABOUT THAT?

MR. ROBINSON: YOUR HONOR, I HAVE JUST HAD ABOUT THREE DAYS TO FAMILIARIZE MYSELF WITH THIS FILE.

AND IT'S MY JUDGMENT FROM LOOKING AT THE FILE THAT THERE ARE A NUMBER OF LOOSE ENDS THAT OUGHT TO BE TIED BEFORE WE SIGN A PRETRIAL STATEMENT.

AS I UNDERSTAND MR. GIANNINI'S POSITION.

HE WANTS TO BE ABLE TO HAVE A FINAL ORDER THAT CUTS OFF DISCOVERY AND GETS US IN A POSITION WHERE WE GO IMMEDIATELY TO TRIAL.

I HAVE NO OBJECTION TO THAT PROCEDURE, BUT I THINK THAT IN ORDER TO AVOID PREJUDICE TO EITHER SIDE THAT WE OUGHT TO TIE THE LOOSE ENDS FIRST.

MY SUGGESTION WOULD BE THAT IF YOU WOULD DO AS YOU DID IN THE LAST CASE, HAVE

ANOTHER STATUS CONFERENCE ABOUT NINETY DAYS FROM TODAY, I WILL MAKE EVERY EFFORT TO DO ALL THE DISCOVERY THAT I THINK IS NECESSARY TO GET THE CASE READY FOR TRIAL.

THE COURT: ALL RIGHT.

MR. GIANNINI, YOU HAVE HEARD FROM MR. ROBINSON.

MR. GIANNINI: WELL, I HAVEN'T SEEN THE SUBSTITUTION PAPERS, YOUR HONOR, BUT I ASSUME MR. ROBINSON IS SUBSTITUTING IN PLACE OF MS. LAVINE, AND --

THE COURT: THAT IS RIGHT.

MR. GIANNINI: - AND I UNDERSTAND HE IS, OBVIOUSLY, GOING TO HAVE TO UNDERTAKE QUITE A SUBSTANTIAL REVIEW.

THE COURT: YES.

MR. GIANNINI: CLEARLY, OUR POSITION ON DISCOVERY IS THAT THERE HAS BEEN A CUT-OFF, SO I WOULD LIKE TO GIVE HIM AN OPPORTUNITY TO GET HIMSELF FAMILIAR WITH THE

CASE BEFORE WE MEET.

BUT I QUESTION WHETHER NINETY DAYS IS REALLY NECESSARY, SINCE IT SEEMS TO ME THAT WE ARE FAIRLY CLOSE TO GETTING A PRE-TRIAL ORDER TOGETHER, MS. LAVINE AND I --

THE COURT: PERHAPS YOU ARE BEING MORE THAN HOPEFUL WITH THOSE REMARKS.

MR. ROBINSON: YOUR HONOR, I JUST WOULD LIKE TO MAKE ONE CORRECTION.

I AM NOT SUBSTITUTING IN PLACE OF MS. LAVINE.

I AM SUBSTITUTING AS CO-COUNSEL. I WILL BE LEAD COUNSEL.

MS. LAVINE WILL STILL BE IN THE PROCEEDING.

THE COURT: OH. I SEE.

MR. GIANNINI: IN THAT CASE, YOUR HONOR, THEN I WOULD THINK NINETY DAYS WOULD BE UNNECESSARY AND THAT --

THE COURT: YES, I WOULD AGREE ON THAT BASIS, ACTUALLY, I WOULD NOT HAVE WANTED TO ALLOW NINETY DAYS, EVEN IF MR. ROBINSON WERE COMING IN AND TAKING OVER THE MATTER COMPLETELY.

BUT WITH YOUR COMING IN AS LEAD COUNSEL, MS. LAVINE REMAINING IN THE CASE, IT SEEMS TO ME THAT WHAT WE SHOULD DO IS SET THIS FOR THE PRETRIAL CONFERENCE.

AND LET'S SAY THIRTY DAYS.

MS. LAVINE: YOUR HONOR, MAY I JUST SPEAK TO THAT POINT?

THE COURT: SURELY.

MS. LAVINE: THERE ARE A NUMBER OF ITEMS WHERE ORDERS OF THIS COURT AND OF THE MAGISTRATE THAT I HAVE SEEN HAVE BEEN MADE TO THE DEFENDANTS, TO PRODUCE CERTAIN TYPES OF INFORMATION, PARTICULARLY, LET'S SAY, COMPUTATIONS THAT ARE NECESSARY FOR OUR EXPERTS TO REVIEW IN ORDER TO COME UP

WITH SOME TYPE OF A FIGURE ON DAMAGES.

IN ADDITION, THERE ARE MATTERS WHICH INVOLVE THE QUESTION OF A DISCRIMINATORY PATTERN, WHICH WE ARE ENTITLED TO UNDER THE GREEN CASE, AND THEY HAVE NOT PRODUCED THAT TYPE OF INFORMATION.

FOR INSTANCE, THEY WILL GIVE US THE FIRST INITIAL, AND A LAST NAME OF A PARTICULAR PERSON, NO ADDRESS, NO WAY POSSIBLE OF INTERVIEWING THAT PERSON.

SO THE RESULT WOULD BE THAT WE WOULD HAVE TO TAKE A MILLION DEPUTIES WHICH WOULD BE PROHIBITIVELY EXPENSIVE, AND WE COULDN'T POSSIBLY DO IT WITHIN THIRTY DAYS.

I WOULD LIKE TO, IF THE COURT WOULD, DO THIS:

IF YOU WOULD SET A NEW STATUS CONFERENCE FOR THIRTY DAYS AND GIVE ME A CHANCE TO SEE EXACTLY WHAT TYPE OF COOPERATION WE ARE GOING TO GET FROM WESTERN AIRLINES, I

THEN MIGHT BE IN A POSITION TO SAY THAT ON A SPECIFIC DATE WE CAN SIGN A PRETRIAL ORDER.

BUT IT'S OBVIOUS TO ME THAT FOR THE PERSON WHO HAS THE BURDEN OF PROOF, BEING THE PLAINTIFF HERE, IT IS PROHIBITIVE FROM ETTING CERTAIN TYPES OF INFORMATION.

IT WOULD BE PREJUDICIAL, IN MY JUDGMENT, TO CUT OFF THAT RIGHT.

AND THAT IS ALL I AM ASKING FOR IS THAT WE COME BACK HERE THIRTY DAYS FROM NOW AND LET'S JUST SEE WHERE OUR PROBLEMS ARE.

AND THERE MAY BE NONE. MAYBE MR. GIANNINI IS GOING TO BE VERY COOPERATIVE.

THE COURT: ALL RIGHT. WELL, I WOULD CERTAINLY HOPE, MR. ROBINSON -- I WANT TO BE FAIR TO ALL PARTIES HERE, THAT WE COULD WORK OUT SOMETHING IN THIRTY DAYS.

AND I WILL TELL YOU, THOUGH, VERY FRANKLY, WE HAVE BEEN THROUGH THE MILL WITH THIS CASE, AND JUDGE WATERS HAS HAD IT PRIOR TO ME AND THE EXPERIENCE HAS BEEN PRETTY SIMILAR.

WHAT I AM GOING TO DO IS SET IT FOR A STATUS CONFERENCE IN THRITY DAYS WITH A -- WELL, I THINK, THEN, WITH A PRE-TRIAL CONFERENCE TO FOLLOW WITHIN ANOTHER THIRTY DAYS OR THE MATTER WILL BE DISMISSED; ONE OR THE OTHER WILL HAPPEN IN THIRTY DAYS.

MS. LAVINE: YOUR --

MR. ROBINSON: YOUR HONOR, I TAKE IT THAT IS SUBJECT TO YOUR REVIEW ON THE THIRTY DAY --

THE COURT: THAT IS RIGHT.

MR. ROBINSON: BECAUSE IT MAY BE THAT WE WILL BE ABLE TO SHOW YOU THAT WE ARE NOT AS DILATORY AS YOU THINK WE ARE.

THE COURT: I AM BERY HOPEFUL OF THAT, MR. ROBINSON.

ALL RIGHT. LET'S DO IT THAT WAY, THEN.

THIRTY DAYS FOR A STATUS CONFERENCE AND WITH CLEAR UNDERSTANDING THAT IT EITHER WILL THEN BE SET VERY SHORTLY FOR A PRETRIAL CONFERENCE, WITHIN ANOTHER THIRTY DAYS, OR IT WILL BE DISMISSED, DEPENDING ON JUST WHAT IS SHOWN AT THIS THIRTY DAY CONFERENCE.

MS. LAVINE: THANK YOU VERY MUCH, YOUR HONOR.

MR. GIANNINI: THANK YOU.

THE COURT: WHAT DATE?

THE CLERK: STATUS CONFERENCE FOR SEPTEMBER 22 AT 10 A.M. AND PRETRIAL AT 10-27 AT 10 A.M.

THE COURT: ALL RIGHT.

THANK YOU MS. LAVINE AND MR. GIANNINI.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

No. CV-124-TJH Date Aug. 11, 1980

Buss vs Western Airlines

DOCKET ENTRY

PRESENT:

HON. TERRY J. HATTER, JR. JUDGE

Florence Kato	Patricia Ferrier
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Joan Celia Lavine Mark Robinson	Paul Giannini

PROCEEDINGS: PRE TRIAL CONFERENCE

Pltf's counsel state that Mark Robinson will be coming in as lead counsel.

Pltf moves for continuance to PTC. Arguments heard.

Status conference set for 9/22/80 at 10:00 a.m. PTC cont'd to 10/27/80 at 10:00 a.m.

Pltf to be ready for PTC on 10/27 or action will be dismissed unless good cause is shown.

APPENDIX M

DARLING, HALL, RAE & GUTE
409 Pacific Mutual Building
523 West Sixth Street
Los Angeles, California 90014
627-8104

Attorneys for Defendant,
Western Air Lines, Inc.

FILED
AUG 11 1980
CLERK, U.S.
DISTRICT
COURT
CENTRAL DISTRICT
OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, v. WESTERN AIR LINES, INC., Defendant.	NO. CV-77-124-TJH(Kx) AFFIDAVIT OF PAUL L. GIANNINI

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

PAUL L. GIANNINI, having been duly sworn, deposes and says:

1. I am an attorney at law, licensed to practice before the Courts of the State of California and an associate in the law

firm of Darling, Hall, Rae & Gute, attorneys of record for defendant, Western Air Lines, Inc., in the above-entitled action.

2. On or about Monday, August 4, 1980, I met with Ms. Joan Lavine and discussed the proposed Pre-Trial Conference Order. This meeting lasted approximately one (1) hour. It was agreed at that time that Ms. Lavine would furnish me with a proposed Order for my review.

3. On Tuesday, August 5, 1980, I telephoned Ms. Lavine and told her it would not be possible to meet that day because I was engaged in deposition in the case of Equal Employment Opportunity Commission v. Western Air Lines, Inc. We arranged a meeting for the following day.

4. On Wednesday, August 6, 1980, Ms. Lavine, her law clerk and myself met for

approximately one and one-half (1-1/2) hours in my office and again discussed the Pre-Trial Conference Order. At this time, I advised Ms. Lavine of my objections to plaintiff's exhibits, and we also agreed upon certain admitted facts. I then had defendant's Contentions of Fact and Law that remained in dispute retyped. My office then contacted Ms. Lavine at approximately 3:37 p.m. that day and told her the retyped Contentions were ready for her review.

5. Sometime during the morning of Thursday, August 7, 1980, this office received the proposed Pre-Trial Statement that is attached as Exhibit "A". Upon my review of that document, I noticed immediately on Page 37 that Ms. Lavine was going to sign the Stipulation "with reservations". I also noted numerous references in the Stipulation of plaintiff's right to augment,

revise, or alter the Pre-Trial Statement; plaintiff also apparently reserved the right to add further exhibits and witnesses.

6. I immediately called Ms. Lavine by telephone and stated that I would not stipulate to the proposed Order in this form. She indicated that she would reconsider her proposed signature "with reservations" and would call me back. This was on Thursday, August 7, 1980.

7. Since that time, I have received only a written communication from Ms. Lavine dated Friday, August 8, 1980, stating that she intends to have the Court sign the Order over my objection.

If called upon to testify to the foregoing statements of fact as true and correct, I would be competent to so testify and certify under penalty of perjury that they are true and correct, except as to those matters based upon information and belief, and as to those matters I believe them to be true.

Executed on (August 8), 1980, at Los Angeles, California.

/s/
PAUL L. GIANNINI

Subscribed and sworn to before me this (8th) day of August, 1980

(SEAL)

/s/
Notary Public in and for the
State of California

APPENDIX N

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CV 77-124-TJH Date Aug. 11, 1980

Buss v. Western Airlines

Docket Entry

PRESENT:

HON. TERRY J. HATTER, JR. JUDGE

Florence Kato	Patricia Ferrier
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Joan Celia Lavine Mark Robinson	Paul Giannini

PROCEEDINGS: PRE TRIAL CONFERENCE

Pltf's counsel state that Mark Robinson will be coming in as lead counsel.

Pltf moves for continuance of PTC.

Arguments heard.

Status conference set for 9/22/80 at 10:00 a.m. PTC cont'd to 10/27/80 at 10:00 a.m.

Pltf to be ready for PTC on 10/27 or action will be dismissed unless good cause is shown.

Initials of Deputy Clerk /s/_____

APPENDIX O

DATE FILED
SEPT. 12, 1980

JOAN CELIA LAVINE
304 South Broadway, Suite 408
Los Angeles, California 90013
Telephone: (213)627-3241

MORRIS LAVINE
304 South Broadway, Suite 408
Los Angeles, California 90013
Telephone: (213)627-3241

MARK ROBINSON, SR.
888 West Sixth Street, 3rd Floor
Los Angeles, California 90017
Telephone: (213)680-4400

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., a corporation, Defendant.	) CASE NO. CV-77-124-TJH-(Kx))) NOTICE OF MOTION TO SCHEDULE FURTHER DISCOVERY AND MOTION THEREON; MEMORANDUM OF POINTS AND AUTHORITIES; DECLARATION OF DR. RAYMOND SCHULTZ (9-29-80; 2:00 p.m.; Mag. Kronenberg)

TO THE DEFENDANT WESTERN AIRLINES, INC.

AND TO ATTORNEYS DARLING, HALL, RAE AND

GUTE AND MR. PAUL L. GIANNINI:

PLEASE TAKE NOTICE that on September 29, 1980 at the hour of 2:00 p.m. or as soon thereafter as said matter can be heard in the courtroom the Honorable John Kronenberg, U.S. Magistrate presiding, located at 312 North Spring Street, 10th Floor, Los Angeles, California, the plaintiff will move, as required by court order, for an order scheduling further discovery herein.

Said motion will be based on the files and records herein, the motion attached hereto, the Response to Orders of December 14, 1979 and December 20, 1979 of Hon. Laughlin E. Waters, filed February 20, 1980 and the List of Items and Issues in Discovery Motions, etc., filed March 24, 1980, the right to discovery herein pursuant to Hickman v. Taylor, 320 US 451 and Federal Rules of Civil Procedure, Rules 26 through 37 and the Federal Magistrates Acts of 1979

as contained in Title 28 U.S.C., Section 636 and the provisions of Title 28 U.S.C., Section 753, as well as due process of law as guaranteed by the Fifth, Sixth and Seventh Amendments, U.S. Constitution.

The Court and counsel are advised that the plaintiff may move to advance the hearing date herein.

Dated: September 12, 1980

Respectfully submitted,

By: Joan Celia Lavine
JOAN CELIA LAVINE and
MORRIS LAVINE, Attorneys for Plaintiff
Robert A. Buss

MOTION TO SCHEDULE FURTHER DISCOVERY

Comes not the plaintiff Robert A. Buss and moves this Honorable Court for an order scheduling further discovery herein, to-wit:

1. Plaintiff incorporates herein by reference those items of discovery contained in his Response to the Orders of Judge Waters, filed herein on February 20, 1980 and his List of Items and Issue in Discovery, etc., filed March 24, 1980 herein.

2. In addition the plaintiff seeks production of the following items, to-wit:

a) Any and all payroll records, whether or not computorized, of William Morrison and Richard McDonald who have been identified by the defendant as the successors of the plaintiff Robert A. Buss.

b) Any and all campaign contribution records of Western Airlines to any

candidate for public office since 1972, and including those made by or through any of its corporate officers, agents, directors, or management personnel, and particularly those made to Alan Cranston (presently a U.S. Senator) and Tom Bradley, (presently mayor the the City of Los Angeles).

c) The person identified as Bruce Wallace, with the costs and expenses of said deposition being sustained and paid for in advance of any deposition at least ten days before said deposition is set to include the court reporter costs and reasonable attorneys' fees paid to the counsel for the plaintiff.

Said motion is based on the files and records herein, this motion and the notice of motion attached hereto and incorporated

herein and a copy of the declaration of Dr. Raymond Schultz, attached hereto and incorporated herein by reference as though fully set forth, and the memorandum of points and authorities attached.

The defendant has attempted to avoid its responsibility to provide the plaintiff with damages discovery by providing a summary of wages for various time periods for Mr. Morrison and Mr. McDonald and has recently presented copies of what it claims are personnel files. This leaves the plaintiff without primary source data from which to compute his damages and leaves him without fringe benefits data from which his expert can compute his damages herein.

Plinatiff seeks an aware of the cost and expenses of his expert Dr. Schultz in having to take his time to repeat damages computations due to the incomplete discovery

from the defendant, and estimates that his added expenses will be approximately between $500 and $1000 due to the failure of the defendant to provide him with prompt, meaningful discovery. Plaintiff also seeks attorneys' fees for this motion being made and costs and expenses, which are reasonable and compensatory.

Dated: September 12, 1980

Respectfully submitted,

Joan Celia Lavine
JOAN CELIA LAVINE,
Attorney for Plaintiff
Robert A. Buss

DECLARATION OF DR. RAYMOND SCHULTZ, PH.D.

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

Dr. Raymond Schultz, Ph.D., economic consultant, makes the following declaration under penalty of perjury

I am and have been at all times mentioned herein an economist and actuary, with my principal place of business being located at 707 Wilshire Blvd., Suite 860, Los Angeles, California. I have been retained by Robert A. Buss for the purpose of providing expert advise and expert testimony inthe case of Robert A. Buss v. Western Airlines, Inc., U.S.D.C. (C.D. Cal.) Case No. CV-77-124-TJH(Kx).

Is is essential that I have the full and complete payroll records of the successors of Robert A. Buss in his last position with Western Airlines in order to

provide expert advise in the above entitled matter on the damages to Mr. Buss. I have been supplied with a copy of a summary of yearly gross amounts for the years 1974, 1975, 1976, 1977 and 1978. I have not been provided with any data at all for the year 1979 or the year 1980. I am informed by Mr. Buss's attorney, Joan Celia Lavine, and believe and on that basis set forth that the sum set forth for the year 1978 is for a portion of that year since the sheet involved was provided to her approximately during mid-1978. A true and correct copy of that partial summary referred to herein is attached hereto, incorporated herein by reference and marked Exhibit "A", bein the payroll data concerning W. J. Morrison.

It is also essential that I obtain itemized information as to the gross salary

of any successor to Mr. Buss for the purpose of providing expert economic advise and testimony. I have been advised that Mr. Morrison is a pilot. If the defendant contends that any aspect of Mr. Morrison's status as a pilot should affect the damages, it is then essential to have a complete payroll and employment records breakdown.

The payroll summary, as contained in Exhibit "A" attached hereto, omits any showing of fringe benefits, such as pension plans, insurance for health or dental programs, investment plans available or participated in, death benefits or retirement benefits. These are all essential for me to have as well as any other fringe benefits containing an itemized breakdown.

I have testified in federal court proceedings as an expert in the area of economics and actuarial information approximately

forty to fifty times, my qualifications having been duly shown.

If called upon and sworn to testify to the foregoing statement of facts, I would be competent to so testify and certify under penalty of perjury that the foregoing is true and correct, except as to those matters based on information and belief and of which I have been advised, and as to those matters, I believe them to be true.

Executed July 18, 1980 at Los Angeles, California.

/s/

Raymond Schultz

RAYMOND SCHULTZ, PH.D.,
Economist and Actuary,
and Declarant

(W.J. Morrison)

(Employee #06615)

Year	Gross Wages	Perdiem
1974	55,618.42	269.10
75	60,824.31	200.20
76	69,603.96	280.15
77	78,349.90	126.30
78	63,810.00	91.80

Pauline Davis

Payroll Asst.

* * * * * *

(Hand-served on Western Airlines defense counsel Darling, Hall & Rae on September 12, 1980 by Lavine law offices law clerk Linda Westbrook)

84-938

No. _____

Office - Supreme Court, U.S.
FILED
DEC 12 1984
ALEXANDER L. STEVAS,
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

ROBERT A. BUSS,

Petitioner,

vs.

WESTERN AIRLINES, INC.,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT AND TO THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

JOAN CELIA LAVINE
Attorney at Law
123 North Hobart Boulevard
Los Angeles, California 90004
(213) 627-3241

Attorney for Petitioner
Robert A. Buss

Vol. III of III

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APPENDIX P

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE TERRY J. HATTER, JR., JUDGE PRESIDING

ROBERT A BUSS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	NO. CV 77-124-TJH
	)	
WESTERN AIRLINES,	)	
	)	
Defendant.	)	
	)	

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Date: Monday, September 22, 1980

PATRICIA FERRIER
Official Reporter
410 U.S. Courthouse
312 North Spring Street
Los Angeles, California 90012
Telephone: (213) 628-8

APPEARANCES:

For the Plaintiff:

JOAN CELIA LAVINE
Attorney at Law
304 South Broadway
Suite 408
Los Angeles, California 90013

MORRIS LAVINE
Attorney at Law
304 South Broadway
Suite 408
Los Angeles, California 90013

MARK ROBINSON, SR.
Attorney at Law
888 West Sixth Street
Third Floor
Los Angeles, California 90017

For the Defendant:

Darling, Hall, Rae & Gute
By: PAUL L. GIANNINI
Attorney at Law
523 West Sixth Street
Suite 400
Los Angeles, California 90014

Also Present:

Plaintiff, Robert A. Buss

I N D E X

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LOS ANGELES, CALIFORNIA, MONDAY, SEPTEMBER 22, 1980, 10:20 A.M.

-0-

THE CLERK: Item one, civil action CV 77-124, Buss versus Western Airlines.

Counsel, Please make your appearances.

MR. LAVINE: Morris Lavine and Joan C. Lavine for Robert Buss.

THE COURT: Thank you, Mr. Lavine.

MR. GIANNINI: Good morning, your Honor. Paul Giannini of Darling, Hall, Rae & Gute, for defendant Western Airlines.

THE COURT: Thank you, Mr. Giannini.

MR. ROBINSON: And Mark Robinson, your Honor.

At this time I have a matter to address the Court on.

THE COURT: Surely.

MR. LAVINE: We object to Mr. Robinson's appearance. He was discharged last Monday

in writing.

Mr. Buss is in court to confirm it, your Honor, and he has no standing in this case.

THE COURT: Mr. Lavine, I will hear from Mr. Robinson as an officer of the Court.

Go ahead, Mr. Robinson.

MR. ROBINSON: Your Honor, on Friday last in the afternoon I received a letter purportedly signed by Mr. Buss asking me to cease and desist in all matters concerning this case, and to file a substitution of attorneys.

I have chose to sign that substitution in open court. I am prepared to do so today, but I wish to state for the record certain things that I think are important.

THE COURT: Yes?

MR. ROBINSON: Obviously, I am somewhat

restrained because of the fact that there could be matters falling within the attorney-client privilege and the work product privilege.

But to the extent that I can, I wish to address the Court as follows:

MS. LAVINE: Excuse me. I object to your getting into any detail at all, Mr. Robinson.

I believe that it will interfere with the work product.

THE COURT: Ms. Lavine, would you please -- go ahead, Mr. Robinson.

MS. LAVINE: Excuse me, sir. I am just making an objection.

MR. ROBINSON: The letter that I received on Friday was unconditional, asking me to be removed. And I believe that my client should have that right.

THE COURT: Of course.

MR. ROBINSON: Earlier in the week I received a conditional statement in which I was advised that I was to be substituted out because I had quote agreed to do so due to the fact that I was so busy that I could not handle this case.

Now, that was the condition which I am unwilling to accept for the following reasons: I appeared here not more than a month ago and advised this Court that I would take over as lead counsel.

I did not do so lightly. I did so after being requested and giving due consideration to the time constraints that I had on my calendar.

And I do not want this Court to think that I would toy with this Court's calendar. I did so in good faith. I remain at all times ready, willing and able to perform as lead counsel. I have so stated

over and over again during the past month, to no avail.

Secondly, it is appropriate that I do this in open court because the local rules require that before I can be effectively substituted out this Court must sign that order.

Also, notice has to be given to the opposing party.

In addition, as the Court must realize, I have an interest in compensation, and under the case of Moore versus Telfon, which is cited at 589 F. 2d, 959, a 1978 case, this Court has authority and jurisdiction and discretion upon substitution of attorneys to handle the matter of just compensation for work accomplished.

I do not at this time ask for that, because I think it would be unduly wieldy and, obviously, where matters are on contingency they must await the outcome.

But I do ask, respectfully, that since I do have an interest here and since I have remained ready, willing and able to perform that this Court make an order that I be given special notice of proceedings as they develop in this Court, particularly since under Section 42 U.S.C.(a), 1988, the code provides that this Court can even award attorneys' fees upon the outcome of a case, that I be given special notice so that at an appropriate time I may make whatever motions are appropriate.

THE COURT: I may very well keep you apprized of things.

At this point I am thinking about dismissing this action. I am just sick and tired of the way in which this is proceeding.

MR. ROBINSON: I only say this: that the man standing to my right is my former mentor. He is an outstanding lawyer, and I think that whatever he would have to say

here with respect to how this case should proceed should be listened to.

I do believe that there are other problems that he has no control over, and I think that in the interest of the client that Mr. Morris Lavine should be heard from in terms of how this case should proceed, and I think that if he were lead counsel here this case would proceed with due dispatch.

THE COURT: Thank you, Mr. Robinson. Mr. Lavine?

MR. LAVINE: May it please the Court.

I deeply appreciate the last remarks of Mr. Robinson. Regretfully, Mr. Robinson was so busy that he did not respond to some of my phone calls last week, although he was in the office, and his secretary said he would call me later, but he never did on the occasions required.

Mr. Robinson has stated -- has become a very able lawyer, and I regret the differences required Mr. Buss to issue the requirements of his withdrawal from the case.

Up to this point he has never personally had a conference with Mr. Buss.

However, I appreciate his last remarks and I appreciate the fact that we have submitted a substitution of attorneys for him to sign, and he has agreed to sign it.

And I ask the Court to approve of that substitution at this time.

THE COURT: Yes. I will sign it under the conditions which have been requested by Mr. Robinson, that is, that he be kept apprised of all matters pertaining to this.

MS. LAVINE: Well, I think the expense of that, you Honor, should be borne by Mr. Robinson, as to the cost of stenographic

work, and so forth.

We are glad to notify him at the time that the issue of fees, comes up, to let him know plenty of time in advance, so that he can present any evidence as to his entitlement to any fees as to the outcome of this case.

THE COURT: I am not suggesting you send him all copies of moving papers, but he should --

MR. ROBINSON: I will pay for the cost of those, your Honor. I will pay for the cost of mailing also.

THE COURT: That would be negligible, in any regard. And you are welcome to have most of the moving papers that I have received.

MR. ROBINSON: Thank you very mucn, your Honor.

The only thing else I would like to correct is that I did have a conference

with Mr. Buss. But that is really not important.

Thank you.

THE COURT: Fine.

MR. LAVINE: Well, he had one going out the door at the last court appearance when the substitution was entered.

May it please the Court.

Mr. Robinson has correctly stated that -- perhaps if you and I can get together on the matter of discovery we can move this case to a completion.

As Judge Waters stated in the records that you have before you, Western Airlines has been successful in evading discovery in a meaningful way.

We ask your Honor's assistance to get from the Western Airlines not only the full names and addresses of the potential witnesses that they say may furnish information, but any others that we may have,

together with their home telephone numbers.

And we have no way of finding out just what information they have, unless your Honor does what Judge Sirica did in Washington, in the Watergate case, make them produce the meaningful information that we need to present all of the facts truthfully to your Honor.

They shouldn't have anything to hide. And your Honor is entitled to that information.

In the Nixon case the Supreme Court of the United States says every witness must be available, that the right to the testimony of all witnesses is a right of citizens and courts.

And if your Honor would sign an order entitling us to the home telephone numbers of these witnesses -- we aren't going to corrupt them. We are going to simply find out what they know, if they do,

about the facts of this case, and present them to your Honor in a meaningful way in trial.

Now, we can't do that, we can't enter the Western Airlines facilities.

We do need the assistance of the Court to get this information. And if your Honor will insist that they have to give us the testimony that Nexon was required to produce in the courts of the United States, we can move this case to a quick solution in a meaningful way.

We ask your Honor to, and we will prepare, if your Honor grants my motion, an order entitling us to the names of all witnesses who have yet to be interviewed. And to prevent us -- to telephone them and to have their home telephone number furnished by Western Airlines.

We do not think that is unreasonable. We think it is fair and just to the

administration of justice, and it would seem that Western Airlines would be glad to provide the freedom of information which we are requesting at this time so that we can truly and fairly try this case with all the facts before your Honor.

We also need the right to contact these witnesses, to subpoena them, a right which the constitution gives us, to have witnesses that we can ccnfront and interview in open court.

And we have to have the names and addresses where they can be subpoenaed.

THE COURT: Mr. Lavine, have you taken this matter up with the magistrate?

MR. LAVINE: Have I taken this matter up with what?

THE COURT: With the magistrate.

MR. LAVINE: Yes, your Honor. But the magistrate's power to bring Western Airlines into Court is limited.

We don't understand that the magistrate can issue--or has the clout which the District Court has in Washington.

It was District Judge Sirica that ordered the matters brought into court. You have the same power here, and I think it would enhance your fine reputation, your Honor, to grant this order and to issue orders that Western Airlines, although it has clout, that the Federal Court has more clout to get the evidence that it needs before it.

MR. GIANNINI: May I just address --

THE COURT: I appreciate your feelings on behalf of the Court.

Yes, Mr. Giannini?

MR. GIANNINI: Thank you, your Honor.

MR. LAVINE: I move --

MR. GIANNINI: Pardon me.

MR. LAVINE: -- as I have addressed your Honor for an order, which we will prepare

in accordance with my request to your Honor.

THE COURT: Thank you, Mr. Lavine. Mr. Giannini.

MR. GIANNINI: Thank you, your Honor.

Good morning. This matter of witnesses was covered well over eighteen months ago, if not two years ago, with Judge Waters, and he ruled based upon previous proceedings before Magistrate Kronenberg that the plaintiffs could contact non-officers of Western Airlines.

The were furnihsed with home addresses, home telephone numbers. So this is water long since under the bridge.

I would ask at this time that the Court, since the Court indicated on August 11 in the pre-trial conference that if there were not adequate prosecution in a lawsuit it would be dismissed, that the case be dismissed at this time, your Honor.

I think there has been a total failure in the last thirty days to do anything that I see, other than to have Mr. Robinson's name appear and disappear on the case.

THE COURT: Yes.

MR. GIANNINI: There is one motion that has been set in front of the magistrate for next week where they ask for political contributions to the campaigns of Senator Alan Cranston and various other government officials, including Mayor Bradley.

Other than that pending motion there has been nothing so far as moving the pre-trial conference ahead, and I would renew at this time our motion to dismiss the action for failure to prosecute.

MS. LAVINE: May I be heard?

THE COURT: You may.

MS. LAVINE: Thank you. Now, I seem to be the person at whom the shots are being

taken.

At our last meeting, sir, I was ready to proceed with a pre-trial conference. It was much to my shock that my new co-counsel made a motion for a continuance.

I am ready to proceed at this time.

Your Honor, the order entered by Judge Waters permitted us to proceed with the discovery to the date of trial.

I have had, since August 7, pending before you a pre-trial statement. My opposition has not signed it, but I have.

I am ready to proceed based on that. One can hardly say that a case with nineteen pages, almost, of docket sheets at the pre-trial level is under prosecuted.

Now, I have sought certain specific discovery matters which I hope that the magistrate will -- excuse me, sir. We are not used to having a good mike in the courtroom (microphone adjusted.)

You can tell me to lower my voice if that bothers you, sir.

THE COURT: I will take care of it. Thank you.

MS. LAVINE: I am afraid you will.

I have asked for payroll records that are computerized. I have been given personnel files in the week before the last pre-trial conference hearing, on August 11, 1980, and a summary of what were suppowed to be, I assume, gross salaries.

There was no fring benefit listing for either of the two successors of Mr. Buss.

I have asked for that information. I have asked for some information which I believe is necessary for Mr. Buss to have, frankly, to evaluate, whether he wants to make certain motions in this Court.

And Mr. Giannini is correct that I have asked for that.

I have asked for the scheduling of the deposition of a man who Western Airlines now claims is the replacement of an expert of theirs called Bruce Wallace.

I must point out to you, sir, that I cannot simply schedule this discovery. I have to make a motion before the magistrate to have it calendared and scheduled.

That means I must give at least a seventeen-day notice.

I stood on my head to have contact with Mr. Robinson. I could not get his attention. So I finally went and ahead and filed the motion that I have filed.

He, outside of this courtroom the last time we were in Court, on August 11, discussed with Mr. Giannini the specter of quote volunteering discovery unquote.

That is an impossibility, it is unrealistic for any attorney familiar with this case to believe that such a thing

could happen.

But I thought maybe Mr. Robinson had some magic, because of his prestige, that might persuade Western Airlines to be cooperative so that we would not have to go through these motions and time-consuming expense, wasting efforts that we have to go through to get any bit of discovery at all. Nothing voluntary appeared whatsoever.

Now, I would like to address, your Honor, about contact in subpoenaing of witnesses.

When I sought to obtain an order from Judge Waters on that matter, sir, you reversed his order. We now stand in a position where we may not contact or subpoena witnesses, based on the order that you have issued.

Perhaps it was inadvertent on your part, but when you denied my applications you denied my application and you said you

were reversing Judge Waters, when I asked you.

That was why I was so persistent at that time in trying to find out exactly what you meant.

Surely you do not think we can try a case without subpoenaing witnesses. We have to have at least such contact with them to do that. That is the circumstance.

Mr. Robinson, after repeated phone calls, after my physically being in his office twice, right after this -- once on the same day that we were last here, and then two days later, I still wasn't able to get his attention.

Unfortunately, he is a very busy man. I realize you have a courtroom full of people. Mr. Robinson has raised the specter of this acrimonious problem

May I ask whether my opposition agrees with the statement of facts in the

pre-trial conference statement, and whether his only disturbing portion is that I have asked for reservations of rights?

THE COURT: You may inquire.

MS. LAVINE: Thank you.

Do you agree with the statement of facts which are prepared and in the proposed pre-trial statement that was delivered to you. I believe, on August 7, 1980?

THE COURT: Ms. Lavine, I believe he understands the question.

MR. GIANNINI: Your Honor, I think we went through all this at the last pre-trial conference hearing, that I had numerous objections to new matter that Ms. Lavine inserted in her proposed pre-trial conference order without previously consulting or notifying me.

THE COURT: There has been no change?

MR. GIANNINI: There has been no contact between plaintiffs' counsel and myself .

since the last hearing.

THE COURT: All right. I do have a full court, and in an effort to enhance this Court's reputation with regard to keeping its order this matter is dismissed without prejudice.

Thank you.

Let's call the next matter.

MS. LAVINE: Very well, sir. Will you --

THE COURT: Call the next matter.

MS. LAVINE: -- then permit me to prepare or have my opposition --

THE COURT: Ms. Lavine, the matter is dismissed.

MR. LAVINE: We object to it on the grounds of denial of due process of law guaranteed by the Fifth and Fourteenth Amendments --

THE COURT: The objection is noted.

MR. LAVINE: -- of the Constitution.

MS. LAVINE: And the Sixth and Seventh Amendments to the United States Constitution.

THE COURT: Thank you.

Call the next matter.

MR. LAVINE: Your Honor --

MS. LAVINE: And we cite you for misconduct, sir.

THE COURT: You are going to be held in contempt if you keep this up, Ms. Lavine.

Go ahead.

***

IN THE UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

THE HONORABLE TERRY J. HATTER, JR., JUDGE PRESIDING

ROBERT A. BUSS,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 77-124-TJH
	)	
WESTERN AIRLINES,	)	
	)	
Defendant.	)	
	)	

C E R T I F I C A T E

I, PATRICIA FERRIER, do hereby certify that I reported the proceedings in the above-entitled cause on September 22, 1980. I further certify that the foregoing is a true, actual and correct transcript of said proceedings.

Los Angeles, California, dated this (15th) day of (October), 1980.

/s/
PATRICIA FERRIER
Official Reporter

APPENDIX Q

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

No. CV-124-TJH Date 9/22/80

Buss vs Western Airlines

DOCKET ENTRY

PRESENT:

HON. TERRY J. HATTER, JR. JUDGE

Florence Kato	Patricia Ferrier
Deputy Clerk	Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:	ATTORNEYS PRESENT FOR DEFENDANTS:
Joan Celia Lavine Morris Lavine Mark Robinson	Paul L. Giannini

PROCEEDINGS: STATUS CONFERENCE

Mark Robinson reports to Court that he has been discharged by pltf as lead counsel on Friday and requests that he continues to receive notice of proceedings. Co-counsel for pltf speak to Court re discharge and

notice. Court instructs counsel to mail copies of all pleadings to Mr. Robinson at his expense.

Pltf orally moves for discovery re names, addresses and telephone numbers of witnesses. Arguments heard.

Deft orally moves for dismissal of action for lack of prosecution. Motion granted.

APPENDIX R

PAUL L. GIANNINI
Darling, Hall, Rae & Gute
400 Pacific Mutual Building
523 West Sixth Street
Los Angeles, California 90014
627-5105
Attorneys for Defendant
WESTERN AIR LINES, INC.

LODGED
OCT 3 1980
CLERK, U.S.
DISTRICT COURT
CENTRAL
DISTRICT OF
CALIFORNIA

FILED
OCT 2 1980
CLERK, U.S. DISTRICT
COURT, CENTRAL DISTRICT
OF CALIFORNIA

ENTERED
OCT 3 1980
CLERK, U.S. DISTRICT
COURT, CENTRAL
DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff,	NO. CV-77-0214-TJH (Kx)
v.	ORDER OF DISMISSAL
WESTERN AIR LINES, INC., Defendant.	

On August 11, 1980 the parties appeared for a scheduled Pre-trial Conference. At the hearing it became evident that no Pre-trial Conference Order had been submitted

by the parties pursuant to the Court's previous orders and Local Rule 9(g). Plaintiff had failed to submit a proposed order in a timely fashion, and the order actually submitted was not in proper form, nor was it acceptable to the defendant. Due to the fact plaintiff had retained new counsel, the Court ordered that a status conference be scheduled for September 22, 1980. The Court further ordered that if plaintiff did not diligently prosecute the action, and failed to have the action ready for a prompt Pre-trial Conference to be calendared at this status conference, that the Court would dismiss the action on its own motion.

On September 22, 1980, plaintiff appeared through his previous counsel, and filed a new substitution of attorneys which relieved the attorney retained the previous month from representing plaintiff.

It appears to this Court that plaintiff has failed to comply with the orders of this Court previously made; plaintiff has failed to diligently prosecute this action and has not contacted opposing counsel regarding the preparation of a proper Pre-trial Conference order since the previous hearing on August 11, 1980.

NOW, THEREFORE, IT IS ORDERED that the above matter is dismissed without prejudice pursuant to Rule 41(b), Federal Rules of Civil Procedure.

DATED: (October 2, 1980)

/s/ (Terry J. Hatter,Jr.
United States District Judge

APPROVED AS TO FORM:

_____
Attorney for Plaintiff

ACKNOWLEDGMENT OF RECEIPT:
Received copy of above document on _____, 1980.

_____
Attorney for Plaintiff

VERIFICATION

. . . .

PROOF OF SERVICE BY MAIL

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action or proceeding. My business address is 523 West Sixth Street, Suite 400, Los Angeles, California 90014.

On (September 29, 19(80), I served the foregoing document described as (ORDER OF DISMISSAL on the plaintiff in this action or proceeding by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Los Angeles, California, addressed as follows:

Joan Celia Lavine, Esq.
304 South Broadway, Suite 408
Los Angeles, California 90013

Executed on (September 29, 19 (80)

at Los Angeles, California.

(State) I declare under penalty of perjury that the above is true and correct.

x (Federal) I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

(Signature)

APPENDIX S

JOAN CELIA LAVINE
304 South Braodway, Suite 408
Los Angeles, California 90013
Telephone: (213)627-3241
Attorney for Plaintiff Robert A. Buss

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, vs. WESTERN AIRLINES, INC., Defendant.	)CASE NO.)CV-77-124-TJH(Kx))NOTICE OF MOTION)AND MOTION TO RE-)CONSIDER ORDER)DISMISSING ACTION)WITHOUT PREJUDICE)AND TO ALTER AND)AMEND SAID ORDER)PURSUANT TO F.R. CIV.P., RULES 59(e) AND 60, AND DUE PROCESS CLAUSE OF FIFTH AMENDMENT, U.S. CONSTITUTION; MEMORANDUM OF POINTS AND AUTHORI- TIES; EXHIBITS (10/20/80; 10:00 a.m.; Judge Hatter)

TO THE DEFENDANT WESTERN AIRLINES, INC. AND TO ATTORNEYS DARLING, HALL, RAE AND GUTE AND PAUL L. GIANNINI:

NOTICE IS HEREBY GIVEN that on October 20, 1980 at the hour of 10:00 a.m., or as

soon thereafter as said matter can be heard, before the U.S. District Judge assigned herein, the Honorable Terry J. Hatter, or such Judge as may be assigned herein, the plaintiff Robert A. Buss will move for reconsideration, alteration and amendment of the order of dismissal, orally announced herein on September 22, 1980, said motion to be pursuant to Federal Rules of Civil Procedure, 59(e), 60, and 1 and the right to due process of law as guaranteed by the Fifth Amendment and Article III, U.S. Constitution, the right to a jury trial and determination of his cause on the merits, and his right not to be coerced into waiving the assertion of his rights to discovery, to damages herein, whether they are punitive, liquidated or for wilful misconduct of the defendant in order to obtain a trial on the merits by a jury and a verdict and judgment fully compensatory and according

to law or to seek appellate review pursuant to Title 28 U.S.C., Section 1291.

Said motion will be also based on the failure of the defendant to give or of the court to provide for notice, whether oral or written, of any purported motion for dismissal or any notice of any grounds so that the plaintiff might have the reasonable opportunity to be heard, presenting evidence on his behalf, all in violation of his right to due process of law as guaranteed by the Fifth Amendment, U.S. Constitution.

Plaintiff will seek to have this Court vacate its order of dismissal on the stated ground "to preserve the decorum of the court", on the grounds that the law neither provides fornor do the facts of this case provide any support for such a dismissal order, said order is clearly erroneous and contrary to law and is plain error on its

face.

Said motion will be based on the further grounds and for the further reasons stated in the motion for reconsideration attached hereto and incorporated herein by reference as though fully set forth, the memorandum of points and authorities attached hereto as well as Exhibits "A" through "M".

Said motion will be based on the files and records herein as well.

Dated: October 1, 1980

By: Joan Celia Lavine
JOAN CELIA LAVINE AND MORRIS LAVINE, Attorneys for Plaintiff Robert A. Buss

MOTION TO RECONSIDER ORDER DISMISSING ACTION WITHOUT PREJUDICE AND TO ALTER AND AMEND SAID ORDER PURSUANT TO F.R. CIV.P., RULES 59(e) AND 60, AND DUE PROCESS CLAUSE OF FIFTH AMENDMENT, U.S. CONSTITUTION

Comes now the plaintiff herein Robert A. Buss and moves this Honorable Court for a reconsideration, alteration and amendment of its order stated orally in court on September 22, 1980 dismissing said action without prejudice "to preserve the decorum of the Court." Plaintiff also moves this Court for an order vacating and striking said order, and for an entry of default against the defendant Western Airlines, Inc. In regard thereto, the plaintiff sets forth the following grounds and reasons, to-wit:

1. The policy of these federal courts provides for a trial and determination on

the merits in accordance with the rights of litigants to settle their grievances in civil matters according to law and in an orderly, consistent process. (Due Process of law as guaranteed by the Fifth Amendment, U.S. Constitution) This is a constitutional and statutory requirement.

Plaintiff has vigorously sought discovery in this case, and has been required to apply to the appellate courts for relief where local orders and two specific orders in this case barred him from seeking reconsideration before a district judge of a U.S. Magistrate's rulings as provided for by Title 28 U.S.C., Section 636, and from adverse rulings which were sufficient limitations on discovery so as to compel the plaintiff to seek pretrial reversals by way of extraordinary writ in three separate writ applications.

This case, in its pretrial stages, now takes up at least nineteen docket sheet pages in the U.S. District Court. It can hardly be said that plaintiff has been anything less than very vigorous in asserting his constitutional rights and particularly his rights to discovery herein as provided for in Federal Rules of Civil Procedure, Rules 26 through 37 and Hickman v. Taylor, 329 US 451, 91 L.Ed. 495.

Plaintiff has been met with truly massive and incredible sabotage, torpedoing and desperate guerrilla warfare by defendant which only the likes of the Ayatollah Khomeini has engaged in. The predecessor Judge assigned to this case, the Honorable Laughlin E. Waters, described the misconduct of the defendant in a hearing on March 23, 1979:

> "I think there has been a deliberate lack of cooperation and an attempt to frustrate this discover procedure

in this case by the defendant."

(Reporter's Transcript of Proceedings, March 23, 1979, page 20, line 21 to page 21, line 1)

The above remarks were made by Judge Waters after much more experience with the defendant herein than Judge Hatter had after him.

Given the above misconduct of the defendant, Judge Waters made the following statement and order:

"I don't think any arbitrary time periods should frustrate appropriate discovery."

(Reporter's Transcript of Proceedings, March 23, 1979, page 43)

In an order filed December 20, 1979, Judge Waters vacated all discovery cut-off and ordered that the discovery issues be litigated on an issue-by-issue basis, apparently each issue to be presented to the

district judge before the next was to be dealt with. I was shortly after that in February, 1980 that plaintiff received notice that this case had been transferred to another Judge, Judge Terry J. Hatter.

With the continuous lack of cooperation of the defendant herein, it was unlikely that it would become congenial in the preparation of a pretrial statement or proposed order. True to form, the defendant through its counsel stormed out of one pretrial meeting on June 18, 1980 at the law offices of Joan Lavine, plaintiff's counsel, refusing to convey Western's contentions, witness list or witness locations or accept that plaintiff would not stipulate to certain facts or conclusions such as a waiver of the issue of wilfulness. This was not the first time that Mr. Giannini, defense counsel for Western Airlines had abruptly left in the middle of a meeting and refused

to complete it; this simply typified the pattern of misconduct of the defendant through its counsel in and effort to sabotage any discovery or trial on the merits herein.

On August 4, 1980, the defendant made a motion for a continuance of the pretrial conference hearing, which Judge Hatter denied, ordering defense counsel to arrange his schedule so as to complete his responsibilities herein. Naturally, defense counsel Mr. Giannini ignored this order of the court, and gave priority to other matters, repeatedly cancelling his appointments with plaintiff's counsel throughout the week of August 4, 1980, failing to meet with Ms. Lavine to go over the pretrial statement on August 7, 1980 when she called his offices and waited for him for several hours, only to be met by a messenger who picked up the draft, not him. (See Exhibits

"A" through "K" attached hereto.)

Plaintiff's counsel Joan Lavine and defense counsel had three meetings on August 4, August 5, and August 6, 1980 and a telephone conversation on August 7, 1980 concerning the pretrial conference statement drafts. The plaintiff's statement of stipulated facts was delivered in draft form to the law offices of the defense counsel by hand on August 4, 1980, and it was discussed at the August 5, 1980 and August 6, 1980 meetings and during a phone conversation on August 7, 1980. I can hardly be said that the plaintiff through his counsel did not contact the defendant through its counsel concerning preparation of the or alteration of the proposed draft; and statements which imply that the plaintiff did not do everything possible to draft a joint statement are false.

The defendant through its counsel served a declaration on plaintiff's counsel on August 11, 1980 admitting that it had not properly attended to the preparation of a pretrial statement. A true and correct copy of the Affidavit of Paul L. Giannini, dated August 8, 1980, is attached hereto and marked Exhibit "K". Plaintiff's copy did not contain the exhibit of a pretrial statement referred to in the body of the affidavit. That affidavit reflects that the defendant's only objection was to plaintiff's reservation of rights as plaintiff reads Mr. Giannini's affidavit.

Plaintiff chose not to waive his objections to the pretrial discover proceedings and notified the court of this position.

If the defendant though its counsel had a change of position, it was obligated to communicate it to plaintiff through its counsel. This defendant did not do until

in court on September 22

2. The defendant failed to properly and formally notice a motion for an order dismissing this action under the 17-day rule for a noticed motion in writing, failed to notify the plaintiff in any way that a dismissal would be moved for on September 22, 1980 and failed entirely to support its claims with any admissible evidence or statements under oath. The defendant failed to articulate any legal grounds in its motion. And the Court stated that it was dismissing the matter without prejudice to the preserve the decorum of the court, which is not a legal ground.

The Court was without jurisdiction to enter such an order in violation of due process of law, and its application of F.R. Civ.P., Rule 41(b) was and is inherently and as construed and applied a denial of due process of law as guaranteed by the

Fifth Amendment, U.S. Constitution, as are F.R.Civ.P., Rule 16 and Local Rules of the U.S. District Court for the Central District of California, Rule 9 in the above entitled matter.

No rule was cited orally by either the defendant or the Court at the time that the oral application was made. Plaintiff objects that the insertion of any rule is beyond the scope of the oral application so that this Court issues an order not based on any application pending before it in compliance with the concept of notice and the opportunity to be heard before a determination is made. (Hovey v. Elliott, 167 US 409, 42 L.ed. 215)

3. Plaintiff respectfully submits that an order of dismissal herein prior to trial, and not being a trial on the merits, is special, partial, arbitrary and capricious, and fails to provide the plaintiff with a

trial on the merits, to his day in court, or to access to the courts as guaranteed by the due process clause of the Fifth Amendment, U.S. Constitution.

4. Plaintiff respectfully submits that the judge has effectively determined the above entitled cause against the plaintiff without the first witness being called and not on the merits and in doing so has removed from the plaintiff the right to a trial by jury as guaranteed him by the Fifth, Sixth and Seventh Amendments, U.S. Constitution. (Title 29 U.S.C., Section 626(c);

5. Opposition counsel made series of false and misleading statements in moving for the entry of a dismissal order during the September 22, 1980 proceedings on a status conference hearing.

First, Mr. Giannini, the defense counsel claimed falsely that full locations and

means of locating witnesses had been supplied to the plaintiff. (Apparently, his remarks included the claim of delivery to plaintiff of home phone numbers which are current.) The Court is invited to examine Exhibit "M", attached hereto and which is the witness list supplied to plaintiff as part of a pretrial memorandum of contentions of law and fact. The Court will observe that only Western Airlines addresses are listed. The Court will also observe telephone numbers all have the same beginning numbers, which plaintiff believes are Western Airlines telephone lines.

The defense counsel have advised plaintiff through his counsel that Western Airoines has a long-term policy of refusing to permit the service of subpoenas or access to employees during work time at Western Airlines facilities. Western Airlines has thus built up a wall around its facilities

and employees while they are at Western Airline facilities so that to supply work addresses and/or phone numbers does not supply plaintiff with locations where potential witnesses can be contacted to be served with subpoenas so that they can be brought into court.

Second, Mr. Giannini falsely represented to the Court in effect that no contact had been attempted or effectuated by plaintiff in regard to the two pretrial conference statement drafts served on the defendant and lodged with this Court on August 5, 1980 and August 7, 1980, and concerning which a draft of a statement of stipulated facts had been served on the defendant on August 4, 1980. (See Exhibits "A" through "L" attached hereto.)

Mr. Giannini refused to draft any of the first three sections, and so indicated to plaintiff and his counsel during an

August 4, 1980 meeting after court. After plaintiff counsel did the work on the first three sections, they were delivered by hand to Mr. Giannini's office on August 4, 1980. Thereafter, after various attempts of plaintiff's counsel and a substantial amount of waiting and setting aside of time to be available, plaintiff's counsel finally managed to meet with Mr. Giannini at the end of the day on August 5, 1980, again on August 6, 1980, but Mr. Giannini failed to appear at Ms. Lavine's office on August 7, 1980 when she had finished a final proposed draft of a pretrial statement and waited for him for several hours, until he finally called and said that he would not agree to a reservation of rights by plaintiff--a messager had appeared to retrieve a copy of the final draft rather than Mr. Giannini coming over to Ms. Lavine's office to go over it with her.

On August 11, 1980 the defense counsel served on Ms. Lavine what appeared to be his full statement of objections to her pretrial statement in the form of an affidavit. The only objection was to a reservation of rights, as far as can be determined from opposition counsel's statement. (See Exhibit "K", attached hereto being the August 8, 1980 copy of an affidavit served on Ms. Lavine on August 11, 1980 in court.)

Mark Robinson, an attorney who had appeared on behalf of the plaintiff once on August 11, 1980 in court, and who lacked apparently any knowledge or understanding that only formal discovery proceedings would induce defendant to provide discovery, entered into some kind of a plan for voluntary discovery with Mr. Giannini after court on August 11, 1980. Plaintiff's counsel Ms. Lavine received a copy of a confirming letter which she assumes was mailed to

defense counsel by Mr. Robinson's office. (A copy of that letter is attached hereto and marked Exhibit "L")

When it became apparent that completed witness lists, including full and complete names, work and home addresses and work and home phone numbers of thos identified in discovery or by defendant as potential witnesses, or any other form of discovery was/not being produced "voluntarily" under Mr. Robinson's concept of doing discovery herein, plaintiff's other counsel Joan Lavine and Morris Lavine filed a formal discovery motion on September 12, 1980 which was taken off calendar due to the oral order of this court dismissing this action.

Among the matters which plaintiff sought was information about the campaign contributions records and assistance given by Western Airlines and persons associated with it to Alan Cranston and Tom Bradley.

Plaintiff is informed and believes and on that basis sets forth that the sone of U.S. Senator Alan Cranston is the law clerk of U.S. District Judge Terry J. Hatter. Plaintiff is also informed and believes that Judge Hatter was previously on the mayoral staff of the mayor of the City of Los Angeles, Tom Bradley and was active politically on his behalf.

Defense counsel made a remark about the above discovery being sought in the course of the September 22, 1980 proceedings. If indeed this was at least one of the grounds for dismissal of this action, although not so articulated by the Court, it is respectfully submitted that plaintiff is entitled to seek discovery which would indicate whether there are facts in that area requiring the Judge assigned to the case to recuse himself. (Title 28 U.S.C., Sections 144 and 455; Tumney v. Ohio, 71

L.ed. 749, 273 US 510)

5. Plaintiff respectfully submits that an order of dismissal in this case effectively punishes the plaintiff for his assertion of his constitutional, civil and statutory rights to seek discover herein, to preserve his right to appeal and to do discovery and exacts from him the price of not being able to bring his cause to trial by a jury for his refusal to waive those rights in a pretrial statement.

6. Said motion is based on the files and records herein, this motion and the notice of motion attached hereto, the exhibits attached hereto and incorporated herein by reference as though fully set forth, the motion for recusal of Judge Terry J. Hatter, filed concurrently herewith and his rights to due process of law and the equal application and equal protection of the laws as guaranteed by the Fifth,

Sixth and Seventh Amendments, U.S. Constitution.

Dated: October 1, 1980

Respectfully submitted,

By: Joan Celia Lavine
JOAN CELIA LAVINE AND MORRIS LAVINE,
Attorney for Plaintiff Robert A. Buss

MEMORANDUM OF POINTS AND AUTHORITIES

It is the policy of these courts to try cases on their merits, rather than on mere technical rulings or determinations and not the facts of the substantive allegations of the plaintiff. (Blunt v. U.S., 244 F.2d 355; Christoffel v. U.S., 190 F.2d 585; Hovey v. Elliott, 167 US 409, 42 L.ed. 215)

Plaintiff was entitled to receive service in writing of a 17-day notice of motion, setting forth specifically the grounds so that he might have the opportunity to be able to present his defense, to do discovery if he chose and to seek full fair

consideration of his position, knowing that of the defendant. (Morgan v. U.S., 304 US 1, 82 L.ed. 1129; F.R.Civ.P., Rule 5)

Plaintiff is entitled to assert and present, without waiver, his position. (Garrity v. New Jersey, 17 L.ed.2d 562, 385 US 493) Plaintiff respectfully submits that the court's order of dismissal is clearly erroneous and plain error to condition his right to a trial on submitting to defendant's demand what he waive asserted rights herein in order preserve his right to appeal.

The local rules as contained in Rule 9 require the defendant to supply full information as to the location of witnesses named in the witness list, but it is the defendant which has failed to supply the home locations of those named witnesses.

It is respectfully submitted that the proper procedure for this Courtto pursue is to provide for separate pretrial

statements with pretrial orders reflecting the unilaterally stated views of each side. (Burton v. Weyerhaeuser Timber Co., 1 FRD 571, Org., 1941)

It is the defendant who has failed to supply a witness list in compliance with Rule 9 at the time required and/or containing informatiion of home locations. This is grounds for the entry of a default against it. (Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939 (5th Cir., 1964)

Federal Rules of Civil Procedure, Rules 59(e) and 60 give this Court the power to reconsider final orders and judgments in the interests of substantial justice.

Plaintiff seeks an order relieving the parties herein of being required to serve all of the papers and pleadings herein on mark Robinson, who appeared in this matter only once and who has no interest or standing which would necessitate this unnecessary

burden on the parties herein.

This motion is directed to the formally entered order of dismissal herein, entered pursuant to oral indications on September 22, 1980 as well as the oral indications.

Plaintiff is entitled to a public trial on all of the issues and matters herein and to be able to file and preserve a full, public record of this case so that he may seek review by the appellate courts herein. The Court, entered an order prohibiting the plaintiff and his counsel from recording out of court meetings and proceedings herein, and precluded him from filing with this Court the record in a full, complete manner of what has occurred in meetings and pre-trial required contacts between counsel on which this Court apparently bases and uses to dismiss this action. Plaintiff objects that this denies him access to the courts with all of the evidence which he is entitled

to present to the court. It is respectfully submitted that this constitutes an impermissible interference with the right of the plaintiff to make a record for the purposes of appeal. (F.R.Civ.P., Rules 6(a) and 10(a); International Business Machines Corp. v. Edelstein, 526 F.2d 37) The plaintiff cannot file a transcript prepared pursuant to Title 28 U.S.C., Section 753 or a tape as evidence that can be reviewed on appeal.

It is the defendant who has engaged in a pattern and practice of refusing to provide discovery who has caused the delay, not the plaintiff.

It is respectfully submitted that the plaintiff is entitled to a trial on the merits in accordance with constitutional, and statutory requirements providing for same by a jury.

WHEREFORE, the plaintiff Robert A. Buss seeks reconsideration, alteration, and

amendment and reversal of the above order of dismissal, the entry of a default against the defendant Western Airlines or in the laternative the setting of this matter for trial by a jury on the plaintiff's pleadings and pretrial statements lodged herein on August 5, 1980 and August 7, 1980.

Dated: October 1, 1980

Respectfully submitted,

By: Joan Celia Lavine
JOAN CELIA LAVINE AND MORRIS LAVINE
Attorneys for Plaintiff Robert A. Buss

PROOF OF SERVICE

I, the undersigned, certify and declare that I am a citizen of the United States, over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above entitled cause. On (October 1, 1980) I served a true copy of (Notice of Motion and Motion To Reconsider Order Dismissing Action, etc)

by personally delivering it to the person(s) indicated below in the manner as provided in F.R.Civ.P., Rule 5(b):

(Darling, Hall, Rae and Gute
523 West Sixth Street, #400
Los Angeles, California 90014)

Mark Robinson Sr.
888 West Sixth Street, 3rd floor
Los Angeles, CA 90017)

BEST AVAILABLE COPY

Executed on (October 1, 1980 at Los Angeles, California.

I hereby certify that I am employed in the offices of a member of the Bar of this Court at whose direction the service was made. I certify under penalty of perjury that the foregoing statements are true and correct.

_____

Signature

304 South Broadway, Suite 408
Los Angeles, California 90013
July 31, 1980

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, U.S.D.C. (C.D.Cal.) CV-77-124-TJH

Dear Mr. Giannini:

I do not know whether we will be required to have a proposed pretrial order ready to present to the Court next week since there has been no determination on my motion for a short continuance.

I would suggest that you write out anything to which you are willing to stipulate and transmit it to me.

You may use my statement of issues of law and fact as a base although I may insert others or may wish to rewrite what I have previously written; I refer to the July 28 memo.

I wish you to understand that your serious delay and tardiness in supplying me with information as the basis for the memorandum of law and facts and preparation of any proposed order for my clients is entirely unacceptable to me. I do not see how I can meet the court deadline as a result.

If there are any facts that you do not dispute, but do not wish to stipulate to, please write those out.

Very truly yours,

JOAN C. LAVINE

EXHIBIT "A"

(hand-delivered August 1, 1980)

Joan Celia (Dollie) Lavine
Attorney at Law
617 South Olive Street, Suite 510
Los Angeles, California 90014
U.S.A.
Telephone (213) 627-3241

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, Inc., U.S.D.C. (C.D.Cal.) Case No. CV-77-124-TJH

Dear Mr. Giannini:

This is to confirm that you and I met after court this morning to discuss the preparation of the pretrial conference proposed order and statement. I reminded you that Judge Hatter's order requires that it be filed the Tuesday before the pretrial conference hearing, rather than Wednesday before.

You told me that you have had a hearing and depositions scheduled for this afternoon and tomorrow.

In response to my correspondence of last week to you about the preparation of the order, you stated that you did not wish to draft a proposed stipulation or statement of facts to which your client has no objection. You told me to do so.

I am enclosing Section I, II, and III as portions of the pretrial conference proposed order draft for you to go over. In addition the contentions of law and fact which are part of the memo may be added as drafts for sections VI and VIII and the Exhibits may be inserted at least in part in VII; I may add to these.

This is to confirm that you phoned my offices at about 4:00 this afternoon and stated that you could not meet with me until tomorrow at 3:00 p.m. You left this message with my clerk. You will barely have time to read over my draft of the work before it must be taken to the courthouse

to be lodged.

Very truly yours,

/s/

JOAN CELIA LAVINE

Enclosure: proposed drafts of sections I, II, and III or pretrial

EXHIBIT "B"

I. TYPE OF ACTION AND THE PARTIES TO THE ACTION

This action is a lawsuit brought by the plaintiff Robert A. Buss against the defendant Western Airlines, Inc., for age discrimination in Employment Act of 1967, Title 29 United States Codes, Section 621, et seq., and particularly Sections 621, 623, and 626 and Section 15 of the Fair Labor Standards Act of 1938, as amended Title 29 united States Codes, Section 201, et seq., and the Fifth and Courteenth Amendments, U.S. Constitution.

Although a merger of Western Airlines, Inc., has been negotiated, it was rejected by the CAB and has not taken place.

The pleadings which raise the issues in this case are all of the papers and pleadings on file herein. Theis includes the first amended complaint, the answer

thereto and this proposed pretrial conference statement and order as well as all the other files and records herein.

II. FEDERAL JURISDICTION AND VENUE

Federal jurisdiction is invoked by the plaintiff based on Title 29, United States Codes, Section 621, et seq., and particularly Sections 621, 623, and 626, and Section 15 of the Fair Labor Standards Act of 1938, as amended Title 29 United States Codes, Section 201, et seq., and the Fifth and Fourteenth Amendments.

Plaintiff timely filed his notices of intent to sue the defendant Western Airlines at both the state and federal levels, on or about December 30, 1975 and November 17, 1975 respectively.

The United States District Court has jurisdiction to hear the claims of the plaintiff as provided for in the above

stated laws of the United States.

Since the principal place of business of the defendant Western Airlines, Inc. is at Los Angeles, California within the Central District of California, the United States District Court for the Central District of California is the proper location for suit to be brought against it. There is no dispute that venue lies in this district.

III. ADMISSION OF FACTS

It is hereby stipulated by and between the plaintiff Robert A. Buss, through his counsel Joan Celia Lavine, and the defendant Western Airlines, Inc., as follows:

1. The plaintiff Robert A. Buss is 67 (sixty-seven) years of age, having been born on January 23, 1913. On October 17, 1975, when he was involuntarily terminated from his employment with Western Airlines,

Inc., he was between 62 and 63 years of age. On October 17, 1975 and to the present Mr. Buss, the plaintiff, has at all times been within the protected class as provided for in title 29 U.S.C., Sections 621, et seq., and particularly 621, 623 and 626 of Title 29 united States Codes.

2. The defendant Western Airlines is an "employer" within the provisions of Title 29 U.S.C., Sections 621, et seq., and Section 15 of the Fair Labor Standards Act of 1938, as amended Title 29 United States Codes, Sections 201, et seq., and the Fifth and Fourteenth Amendments, U.S. Constitution, and therefore subject to said provisions and the enforcement of same.

3. The plaintiff duly and in a timely fashion registered complaints with the appropriate state and federal agencies and notices of intent to sue and has exhausted his administrative remedies as required by

law. This United States District Court has jurisdiction to proceed to trial in the above entitled matter and to enter judgment against the defendant Western Airlines, Inc. upon a finding of liability and damages. The plaintiff filed his appropriate notice of intent to sue and complaint with the United States Department of Labor on or about December 30, 1975. receipt of that notice of intent to sue was received on or about January 12, 1976, against Western Airlines for discharging him on account of his age on October 17, 1975.

The plaintiff Robert A. Buss filed a complaint and notice of intent to sue against Western Airlines alleging discrimination on account of his age due to his discharge on October 17, 1975 in writing on November 17, 1975 with the Fair Employment Practice Commission, State of California, Agriculture and Services Agency.

4. The plaintiff Roberat A. Vuss was replaced in his position by a younger person, Robert Morrison, born on August 21, 1926, when Mr. Buss was discharged on October 17, 1975.

5. Mr. Buss has at no time been offered reemployment with Western Airlines since he was terminated on October 17, 1975.

6. prior to his discharge from his employment with Western Airlines on October 17, 1975, he had worked for Western Airlines for about 35 years, starting in 1940.

7. At the time of his termination on October 17, 1975, Mr. Buss was Director, Flight Crew Ground Training. He had been in this position for about five years prior to his termination on October 17, 1975.

8. At the time of his discharge on October 17, 1975, the plaintiff Rcbert A. Buss was qualified to be Director, Flight Crew Ground Training.

9. Plainntiff is entitled to recover compensatory damages herein.

Joan Celia (Dollie) Lavine
Attorney at Law
304 S. Broadway, Suite 408
Los Angeles, California 90013
U.S.A.
Telephone (213)627-3421

August 5, 1980

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, Inc., U.S.D.C. (C.D.Cal.) CV-77-124-TJH(Kx) and pre-trial statement

Dear Mr. Giannini:

This is to confirm that you have not delivered to my any information that could be included in a pretrial statement to August 5, 1980 at 4:30 p.m.

This is to confirm that you called my offices at noon-time and cancelled our 3:00 p.m. meeting this afternoon. I talked with you at about 1:45 p.m. and you told me that you expected to be engaged in a deposition for the entire afternoon to at least between 4:00 p.m. and 5:00 p.m. and

could not meet with me. You conveyed nothing to me orally that could be included in a pretrial statement.

This is to confirm that proposed sections I, II and III were delivered to your offices yesterday afternoon and the issues of law and fact in draft form for you to go over as contained in the Plaintiff's Contentions, filed July 28, 1980 were brought to your attention to go over.

Yesterday, you agreed to produce the personnel and payroll files of Mr. Buss's successor, Mr. Morrison. You also agreed to produce the same information for a Mr. McDonald. You advised me yesterday after court that an update of the home locations of persons identified in your discovery is being prepared for me and will be available to me very shortly.

Very truly yours,
/s/
JOAN CELIA LAVINE

Hand-delivered August 5, 1980

Enclosure: Plaintiff's statement of Progress concerning Pretrial Proceedings under Local Rule 9 and F.R.Civ. P., Rule 16, dated August 5, 1980.

EXHIBIT "C"

JOAN CELIA LAVINE

Law Offices
MORRIS LAVINE
617 South Olive Street
Los Angeles, Calif., U.S.A.
90014
Telephone (213)627-3421

August 6, 1980

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, Inc., U.S.D.C. (C.D.Cal.) Case No. CV-77-124-TJH(Kx)

Dear Mr. Giannini:

This is to confirm that I waited for you throughout yesterday, August 5, 1980, in order to work with you on the Buss pre-trial conference statement. Your offices phoned me between 4:30 p.m. and 4:45 p.m. and you and I made an appointment to meet between 5:00 p.m. and 5:15. p.m. yesterday, August 5, 1980.

Neither at our late afternoon meeting yesterday, August 5, 1980, nor previously

did you provide me with anything you indicated should be included in a pretrial statement. You stated that you had not read anything that I had had hand-delivered to your offices, which included a draft for a stipulation as to the admission of facts in this case.

You were entirely unable to discuss with me the papers which I had conveyed to you and you wanted to meet again this morning. I suggested 9:30 a.m. You wanted a later meeting at 10:00 a.m. You told me that you are waiting to go to another court proceeding in some preliminary injunction or TRO hearing and that you had been in deposition all of yesterday afternoon. You told me you had been in a hearing all of Monday afternoon; I assume this was a matter before Magistrate Kronenberg that you had previously mentioned was scheduled.

I am under the impression from your representation to me late yesterday afternoon when I met with you at your offices that you expect to be tied up in another court matter for most of today, August 6, 1980.

As I have indicated to you in the past I have a 24-hour answering service through which I can be located.

EXHIBIT "D"

However, I have remained available for a rather extended period of time. I even had to wait about 15 minutes for you late yesterday when I came over to your offices, at about 5:00 p.m.

If you are too busy to deal with this matter, I would suggest that you have another attorney in your offices meet with me and work on the pretrial statement, if the judge will accept it late.

This is to confirm also that I hand-delivered to you at our meeting a completed pretrial statement that I prepared on behalf of Mr. Buss and filed for him. I have checked my copy of the pretrial conference order which indeed does require that the pretrial statement be filed by the Tuesday before the pretrial conference hearing.

This is also to confirm that you gave me some papers about a Mr. McDonald. However, you told me that they are not complete; that is a slight understatement. They do not include the payroll records and appear to omit most, if not all matters, since about 1977.

I still have not been conveyed any of the payroll or personnel records of Mr. Morrison, Mr. Buss's sucessor and replacement.

I would suggest that you type your portions of any drafts of a pretrial statement and I will type mine so that they can be conbined. You always seem to be late in doing everything, and I do not want to be responsible for your late work.

Sincerely,

JOAN CELIA LAVINE

HAND-DELIVERED

EXHIBIT "E"

(Handwritten)

H.

OTHER MATTERS

1. The parties disagree as to the time estimated for trial. Pl. estimates 15 trial days. Def. estimates six to eight trial days.

2. Def. contemplates law & motion proceedings regarding pl's witnesses listed for trial, & in particular, expert witnesses.

3. Pl. contemplates further discovery on the issue of damages, & if a writ is granted, or a change of ruling on discovery, will wish to pursue (? illegible), in addition pl. wishes to continue depo of R V Sorenson & may wish to depose Bruce Wallace.

4. Def. will seek further responses to its interrogatories to pl., & also conduct discovery at pl's experts & the basis for first opinions. Also def. wants copies of all trial exhibits and an opportunity

to depose witnesses not identified in pl's interrogatory responses.

5. Def. contests pl's right to a jury trial on all of the issues listed herein, & relies upon Lorillard v. Pons, 434 U.S. 515 (1978) to guide this Court.

This is the
draft referr
to in Ex. H

EXHIBIT "F"

Law Offices
DARLING,HALL, RAE & GUTE
400 Pacific Mutual Building
823 West Sixth Street
Los Angeles, California 90014

Area Code 213
627-8104

August 6, 1980

Time: 3:30 P.M.

Joan Celia Lavine
Attorney At Law
304 South Broadway
Suite 408
Los Angeles, CA 90013

RE: Robert A. Buss v. Western Air Lines, Inc. U.S.D.C. No. CV 80-77-124-TJH(Kx)

Dear Ms. Lavine:

Pursuant to your request and Mr. Giannini's instructions, enclosed please find copies of the following documents:

1. Objections to Plaintiff's Exhibits list; and

2. Defendant's Contentions of Fact.

Very truly yours,

DARLING, HALL, RAE & GUTE
/s/
P. V. Jones
Secretary to PAUL L. GIANNINI
Enclosures

EXHIBIT "G"

DEFENDANT'S CONTENTIONS OF FACT

1. Defendant Western Air Lines, Inc. ("Western") is a Delaware corporation, authorized to do business and doing business in the County of Los Angeles, State of California, at all times herein mentioned. Defendant is an employer within the meaning of 29 U.S.C. @630(b). Western is a commercial airline carrier certificated by the Civil Aeronautics Board.

2. Plaintiff was first employed by defendant on February 15, 1940, and became enrolled in defendant's Retirement Income Plan ("Retirement Plan") on or about July 1, 1952, for non-contract employees.

3. For purposes of computing retirement benefits and seniority, the above dates were used by defendant.

4. The last day worked by plaintiff was October 17, 1975. Plaintiff was told in or about September of 1975 that he was

bein relieved of his duties, but that he would receive ten weeks salary until January 23, 1976, as well as accrued vacation pay.

5. Plaintiff applied for "early retirement" under defendant's Retirement Income Plan on January 26, 1976.

6. Plaintiff received as part of that retirement income plan, a lump sum payment in the amount of $17,469.39.

7. Plaintiff receives under the Retirement Income Plan of defendant the monthly payment of $921.67 per month from February 1, 1976, and each month thereafter. Plaintiff has received payments in that amount since February 1, 1976.

8. Plaintiff was Director of Ground Trainin - Flight from 1971 to June 25, 1974, when his title was changed to "Director-Flight Crew Ground Training."

9. Plaintiff was "Director-Flight Crew Ground Training" from June 25, 1974 to his furlough on October 17, 1975.

10. Prior to 1971, plaintiff was "Assistant to Vice-President, Flight Operations", who was H. W. Coward.

11. Plaintiff filed a notice of intent to sue with the Department of Labor on or about January 12, 1976.

12. Plaintiff's annual salary at the time of his retirement was approximately $30,004.00.

13. Plaintiff was informed he was to be placed on furlough as Director-Flight Crew Ground Training in or about September of 1975. Plaintiff was informed at that time that his separation from Western was permanent.

14. Plaintiff was counselled by A. B. Favero, Senior Vice President, Operations, and Robert V. Johnson, Vice President

Flight Operations, on the utilization of his time and that of the employees under his supervision on many occasions from April 1974 until he was furloughed in 1975.

15. Plaintiff refused to qualify himself to do direct training in the flight school as requested by both Messrs. Favero and Johnson.

16. Mr. Richard McDonald, a manager under Mr. Buss was also instructed to qualify himself to train in the flight school program, and did so qualify, as did other employees.

17. Plaintiff refused, in a memorandum dated June 27, 1974, to furnish A. B. Favero either with "instructor hours available" or "instructor hours utilized," as he had been requested to do. This information was necessary for management to make appropriate personnel decision.

18. Plaintiff was counselled by Robert V. Johnson to furnish the information to Mr. Favero which was requested by him in a timely fashion, but failed and refused to do so.

19. Plaintiff on more than one occasion complained to Robert V. Johnson,his superior, about responding to requests for information regarding the utilization of personnel in his department.

20. Messrs. Favero and Johnson made it clear that they believed plaintiff's department to be under-tuilizing its personnel, on several occasions. Nevertheless, plaintiff did not make any efforts to reduce the number of employees under his supervision until ordered to do so by his superiors.

21. During the period April 1974-1975, some of the personnel under plaintiff's supervision were placed on furlough or

transferred to other divisions or departments for reasons of economy.

22. Due to a shortage of fuel, and the Arab oil embargo, flight operations for defendant were curtailed during the 1974-75 period. Many of defendant's employees in all departments of the company had to be placed on furlough or terminated, for reasons of economy.

23. At the time of plaintiff's separation from Western, the Company had a policy of furloughing management employees on the basis of overall performance evaluation in which the least effective (lowest performance ratings) management employees were those furloughed first. Plaintiff's overall evaluation by his superiors was that his performance as a director of the flight crew training school was grossly inefficient and ineffective.

24. The employee who replaced plaintiff as director of the flight crew training school was able to manage and operate the school and its employee instructors with one-third fewer employees than those supervised by plaintiff, while still training substantially the same number of pilots as previously.

25. The primary responsibilities and duties of the Director-Flight Crew Ground Training was to be responsible to the Vice President-Flight Operations, for all (Federal Aviation Administration) required recurrent, initial and transitional ground school and flight simulator training of pilot personnel.

26. Western's Retirement Income Plan for non-bargaining employees ("Retirement Plan") was and is a bona fide retirement or pension plan, and was not instituted as a subterfuge to evade the purposes of the

ADEA.

27. The Retirement Plan has uniformly been applied so that retirement at the normal retirement date has always been the case. The Retirement Plan provided in October of 1975 for a normal retirement date of age 65.

28. Plaintiff's employment would have ceased on February 1, 1978, had he not been terminated in October of 1975, as the provisions of the Retirement Plan would have forced his retirement on that date.

29. Plaintiff voluntarily enrolled in the Retirement Plan and continued making contributions thereto while employed at Western.

ROBERT A BUSS V. WESTERN AIRLINES, INC.,
Case No. CV-77-142-TJH

EXHIBIT LIST OF PLAINTIFF

Description	Date Marked	Date Admitted	Objections
1. Letter stating Mr. Buss would retire as of October 17, 1975, signed by Robert V. Johnson (no date)			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery
2. Letter praising Mr. Buss's performance, signed by Anton Favero, senior vice president of Western Airlines, dated October 21, 1975			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery
3. Files and records of the U.S. Department of Labor concerning age discrimination complaint of Mr. Buss and investigation of same, finding Mr. Buss had been discriminated against on account of his age by Western Airlines			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
4. Files and records and documents of the California Department of Employment Development Department concerning October 17, 1975 discharge and comp.			Hearsay, relevance Rules 403, 703, 704, 801, not produced in discovery
5. Payroll records of William Morrison			Hearsay, relevance Rules 403, 703, 704, 801, not produced in discovery.
6. Payroll sheet prepared by Pauline Davis showing Mr. Morrison's gross salary and per diem starting in 1974 (undated)			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
7. General administrative manual of Western Airlines for 1973			Hearsay, relevance, Rules 403, 703, 704, 801, not provided in discovery.
8. General administrative manual of Western Airlines for 1974.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.
9. General administrative manual of Western Airlines for 1975.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.

Description	Date Marked	Date Admitted	Objections
10. General administrative manual of Western Airlines for 1976.			Hearsay, relevance, Rules 403, 703, 704, 801, not produced in discovery.
11. General administrative manual of Western Airlines for 1977.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
12. General administrative manual of Western Airlines for 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
13. General administrative manual of Western Airlines for 1979.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
14. General administrative manual of Western Airlines for 1980.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
15. Confidential memorandum concerning furlough policies of Western Airlines, dated 8/24/74.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
16. A copy of a note dated September 15, 1975, initialed purportedly by Anton Favero.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
17. The original note dated September 15, 1975, initialed purportedly by Anton Favero.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
18. The original and copies of note, dated September 16, 1975 initialed by Anton Favero and sent to Robert V. Johnson telling Mr. Johnson to "retire" Mr. Buss.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
19. The personnel files of Robert A. Buss of Western Airlines.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.
20. The yearly, annual shareholder's reports published by Western Airlines from the year 1973 to the present time of the trial.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
21. The quarterly statements prepared by Western Airlines for its shareholders and published.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
22. The depositions of Robert A. Buss taken herein and the attachments thereto.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
23. The depositions of Arthur Kelly, taken August 17, 1978 herein.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
24. Checks disbursing funds from annuity and pension plan, starting in May, 1976, by Prudential Life Insurance Company to Robert A. Buss.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
25. Pension and retirement plan to which William Morrision has belonged between November 10, 1975 and date of trial.			Hearsay relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
26. Pension plan folders and statements as to non-bargaining employees of Western Airlines, which applies to Robert A. Buss			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
27. The deposition of Robert J. Schnitzer, taken August 14, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
28. The deposition of Robert V. Johnson taken May 31, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
29. The deposition of of Anton Ben Favero, taken June 1, 1978.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
30. Western Airlines articles of incorporation or corporate charter.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
31. Western Airlines by-laws			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objections
32. Western Airlines corporate minutes, executive committee, shareholder and board of directors from 1970 to the present time.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
33. The files and records of Buss v. Western Airlines, U.S.D.C. (C.D.Cal.) CV-77-124			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
34. The files and records of Buss v. U.S.D.C. (C.D.CAL.) U.S.C.A. (9th Cir.) 78-3174			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
35. Files and records of Western Airlines v. Union Oil Co., U.S.D.C. (C.D.Cal.)CV-75-1351-JWC and particularly the complaint and interrogatories and responses to same.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
36. Employee's Annual Statement concerning Retirement Income Plan for years 1971 through present time.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
37. Document production, pursuant to response filed herein on August 29, 1977.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
38. Computor printouts of Robert'Buss's pension plan information from December 12, 1975 print-out			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
39. Prudential Notice to Recipients of Taxable Lump Sum Distributions, etc.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
40. Letter dated February 1, 1976 from Prudential to Robert A. Buss concerning annuity.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
41. Prudential letter, dated May 5, 1976, to Robert A. Buss showing return of employee contributions ($17,469.39)			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
42, Los Angeles Magazine, September, 1977 article "Down to Basics", by Tom Link, starting page 110.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
43. SEC Westen Airlines filing, Form S-7, August 10, 1977.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
44. Quarterly Shareholder statements since 1973 of Western Airlines.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
45. January 28, 1977 article, Valley News, "Western will buy 7 jetliners.			Hearsay, relevance, Rules 403 703, 704, 801 not produced in discovery.
46. Forbes, October 15, 1976, article "Alone in the Cockpit", page 63.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
47. Letter, dated January 23, 1976, to Robert A. Buss from Bruce Wallace.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
48. Summary Annual Report for the Plan Year August 1, 1975 to July 31, 1976 of Westenr Airlines Group Insurance plan, etc.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery
49. Copies of pilot's license of Robert A. Buss.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

Discovery	Date Marked	Date Admitted	Objections
50. Letter of May 25, 1973, re New Minimum Retirement Income and 1972 Annual Statement			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
51. Letter of Brig Whittaker, undated			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
52. Interoffice Correspondence to Robert A. Buss dated 8-30-74 re retirement income plan from Pat Ryan			Hearsay, relevance, Rules 403, 703,704, 801 not produced in discovery
53. Letter of September 3, 1974 re Annual Statement for Management, Administrative and Technical Employees from Dan Zaich.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
54. Letter of January 27, 1975 to all management and administrative & Technical employees from Dominic Renda.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
55. Letter of May 25, 1976 to participants in Western Airlines Retirement Income Plans, etc.			Hearsay, relevance, Rules 403 703, 704, 801 not produced in discovery.

Description	Date Marked	Date Admitted	Objection
56. Receipt, dated May 16, 1978 from Paul L. Giannini in regards to the items number 50 through 55.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
57. May, 1980 edition of newspaper, Flight Times, published by Western Airlines.			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.
58. March, 1976 Flight Times			Hearsay, relevance, Rules 403, 703, 704, 801 not produced in discovery.

LAW OFFICES
DARLING, HALL, RAE & GUTE
400 PACIFIC MUTUAL BUILDING
523 WEST SIXTH STREET
LOS ANGELES, CALIFORNIA 90014

Joan Celia Lavine
Attorney At Law
304 South Broadway
Suite 408
Los Angeles, CA 90013

TO BE PICKED UP BY MS. LAVINE'S OFFICE

TODAY

JOAN CELIA LAVINE

Law Offices
MORRIS LAVINE
304 S. Broadway, #40B
Los Angeles, Calif., U.S.A.
90013
Telephone (213) 627-3421

August 8, 1980

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, Inc., U.S.D.C. (C.D.Cal.) Case No. CV-77-124-TJH(Kx)

Dear Mr. Giannini:

This is to confirm that I met with you from about 10:00 a.m. to 11:30 a.m. on August 6, 1980 at your offices at 523 West Sixth Street, Suite 400, Los Angeles, California to work on the preparation of a pretrial statement in Buss v. Western Airlines. For the first time, you conveyed to me a writing indicating something that you wanted included, which started with "IX . . . Other Matters" and which was written out by you while I was with you

at that time. You also indicated for the first time to me what you approved of and what you disapproved of in the first three sections I had prepared and which had been hand-delivered to your offices on August 4, 1980. You told me that you would re-write your issues of fact, and you asked me to put in proper form your contentions of law. This was the first time you told me what you wanted included as your contentions of law and fact, which remain to be litigated or any other matter in the pretrial statement. You had no other objections.

At the above meeting you did not state what your objections to exhibits were; you advised me that you had not prepared these yet.

At about 3:30 p.m. on August 6, 1980 my offices received a phone call that your contentions of fact and your objections

1

to my exhibits could be picked up at your offices. You did not deliver same to my offices, but waited for me to send someone at my expense to your offices for them, at about 4:00 p.m. that day.

At between 11:30 a.m. and noon, August 7, 1980 I phoned your offices and left word that you could come over and go through the completed draft of the pretrial statement I had prepared, based on your objections at on August 6, 1980 meeting and what you had conveyed to me in writing. I had tried to reach you by phone on at

EXHIBIT "H"

least four (4) occasions, August 7, 1980 during the morning, but was repeatedly told that you were on another line and would not take the phone.

From the time I left word that you could come over to my offices to pick up and go over the final draft of our pretrial statement, I waited for you in my offices. You did not return my calls. Rather, at about 12:45 p.m. a messenger came to my door and stated that he was from your offices and wanted to pick up some papers that were to be ready for him.

I continued to await your arrival at my offices, but at close to 3:00 p.m., August 7, 1980, instead of coming over to go over the document with me, you phoned me and stated that the pretrial statement was objectionable to you and that you would not execute it. This was although when I asked you if you had read the document sent over to you, you indicated and admitted that you had read only "portions of it", not the entire document. The "Closing Paragraph" had been contained in the first

pretrial statement that we were working from on August 6, 1980, and you did not at that time state any objection to it whatsoever; it is that section which I gather that you object to now.

I wish to advise you that I am satisfied with the pretrial statement which your courier picked up and do not wish to modify it to preclude or waive the rights of my clients to have full and fair access to the courts. I therefore have conveyed to the court the original of the draft conveyed to you yesterday, for the Court's execution in its present form.

As I have indicated to you on many occasions in the past, I am always willing to discuss any matter in the Buss case. However, I have found it very difficult to work with you since you seem to have

paid far more attention to other matters this week than the Buss case.

Very truly yours,

/s/

JOAN CELIA LAVINE

Hand-delivered August 8, 1980

EXHIBIT "I"

JOAN CELIA LAVINE

Law Offices
MORRIS LAVINE
304 S. Broadway, Suite 408
Los Angeles, California, U.S.A.
90014
Telephone (213) 627-3241

Mr. Paul L. Giannini
Darling, Hall, Rae and Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines, U.S.D.C. (C.D.Cal.) Case No. CV-77-124-TJH

Dear Mr. Giannini:

This is to confirm that you handed me on August 6, 1980 at our morning meeting some documents which appear to be portions of the personnel file of William Morrison, who replaced Mr. Buss has Director, Flight Crew Ground Training.

I asked you for the payroll records of Mr. Morrison which you told me were computerized. No copies of ledgers or computerized data on either Mr. Morrison or a Mr. McDonald have been conveyed to me to

date for the undertaking of damages computations on Mr. Buss's behalf, although you have promised me this information. I await same, including fringe benefits data.

Sincerely,

/s/

JOAN CELIA LAVINE

Hand-delivered August 8, 1980

EXHIBIT "J"

DARLING, HALL RAE & GUTE

400 Pacific Mutual Building

523 West Sixth Street

Los Angeles, California 90014

627-8104

Attorneys for Defendant, Western Air Lines, Inc.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff, v. WESTERN AIR LINES, INC., Defendant.	NO. CV-77-124-TJH (Kx) AFFIDAVIT OF PAUL L. GIANNINI

STATE OF CALIFORNIA)
) ss.
COUNTY OF LOS ANGELES)

1. I am an attorney at law, licensed to practice before the Courts of the State of California and an associate in the law firm of Darling, Hall, Rae & Gute, attorneys

of record for defendant, Western Air Lines, Inc., in the above-entitled action.

2. On or about Monday, August 4, 1980, I met with Ms. Joan Lavine and discussed the proposed Pre-Trial Conference Order. This meeting lasted approximately one (1) hour. It was agreed at that time that Ms. Lavine would furnish me with a proposed Order for my review.

3. On Tuesday, August 5, 1980, I telephoned Ms. Lavine and told her it would not be possible to meet that day because I was engaged in deposition in the case of Equal Employment Opportunity Commission v. Western Air Lines, Inc. We arranged a meeting for the following day.

4. On Wednesday, August 6, 1980, Ms. Lavine, her law clerk and myself met for approximately one and one-half (1-1/2) hours in my office and again discussed the Pre-Trial Conference Order. At this

time, I advised Ms. Lavine of my objections to plaintiff's exhibits, and we also agreed upon certain admitted facts. I then had defendant's Contentions of Fact and Law that remained in dispute retyped. My office then contacted Ms. Lavine at approximately 3:37 p.m. that day and told her the retyped Contentions were ready for her review.

5. Sometime during the morning of Thursday, August 7, 1980, this office received the proposed Pre-Trial Statement that is attached as Exhibit "A". Upon my review of that document, I noticed immediately on Page 37 that Ms. Lavine was going to sign the Stipulation "with reservations". I also noted numerous references in the Stipulation of plaintiff's right to augment, revise, or alter the Pre-Trial Statement; plaintiff also apparently reserved the right to add further exhibits and witnesses.

6. I immediately called Ms. Lavine by telephone and stated that I would not stipulate to the proposed Order in this form. She indicated that she would reconsider her proposed signature "with reservations" and would call me back. This was on Thursday, August 7, 1980.

7. Since that time, I have received only a written communication from Ms. Lavine dated Friday, August 8, 1980, stating that she intends to have the Court sign the Order over my objection.

If called upon to testify to the foregoing statements of fact as true and correct, I would be competent to so testify and certify under penalty of perjury that they are true and correct, except as to those matters based upon information and belief, and as to those matters I believe them to be true.

Executed on (August 8, 1980, at Los Angeles, California.

/s/
PAUL L. GIANNINI

Subscribed and sworn to before me this (8th) day of August, 1980.

(SEAL)

/s/ (Esperanza Ramos Franco)
Notary Public in and for the
State of California

LAW OFFICES
ROBINSON, ROBINSON & SPENCER

Los Angeles Office
888 West Sixth Street, Suite 300
Los Angeles, California 90017
Telephone (213) 485-1766

August 11, 1980

Paul L. Giannini, Esq.
Darling, Hall, Rae & Gute
523 West Sixth Street, Suite 400
Los Angeles, California 90014

Re: Buss v. Western Airlines

Dear Mr. Giannini:

This will confirm our conversation of this date in which we both agreed to attempt to complete the discovery process as much as possible by informal requests for information and informal responses.

You have indicated that you will send me a letter indicating the names of the persons you wish to depose prior to trial, and we will provide you with a similar letter shortly.

You have already indicated that you will give us the full names and addresses of prospective witnesses whom we may or may not wish to depose or to interview.

Thanking you for your cooperation, I am

Yours very truly,

/s/

Mark P. Robinson

MPR/jh

cc: Joan C. Lavine

EXHIBIT "L"

EXHIBIT A

WITNESS LIST OF DEFENDANT
WESTERN AIR LINES, INC.

WITNESS	TELEPHONE NO.
DOMINIC P. RENDA, President Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345
ANTON B. FAVERO, Senior Vice President, Operations Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345
ROBERT V. Johnson, Vice President, Flight Operations (Retired) Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345
DONALD W. VENA, Director, Personnel Administration Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345
BRUCE WALLACE, Manager Pension Benefits Western Air Lines, Inc. 606 Avion Drive Los Angeles, California 90009	646-2345
ROBERT BUSS (Plaintiff)	

WITNESS	TELEPHONE NO.
CARL NESBITT, Director of Profit Planning Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345
WILLIAM MORRISON, former Director, Flight Operations Training Western Air Lines, Inc. 6060 Avion Drive Los Angeles, California 90009	646-2345

EXHIBIT "M"

APPENDIX T

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES -- GENERAL

(ORIGINAL)

CV 77-124-TJH Date 10/20/80

Robert A. Buss vs Western Airlines

DOCKET ENTRY

(10/22/80) Taxed Costs in sum of $_____, against (deft.) (DENIED)

(/22/80) Taxed costs in sum of $(265.10), against (PLTF.)

ENTERED
OCT 23 1980

CLERK,U.S.DISTRICT
COURT, CENTRAL DIS-
TRICT OF CALIFORNIA

PRESENT:

HON. TERRY J. HATTER, JR., JUDGE

Florence Kato
Deputy Clerk

Patricia Ferrier
Court Reporter

ATTORNEYS PRESENT FOR PLAINTIFFS:

Joan Celia Lavine

ATTORNEYS PRESENT FOR DEFENDANTS:

PROCEEDINGS: HRG re Pltf's Motion to Recuse Judge Hatter
re Pltf's Motion to Reconsider Dismissal of Action

The Court having considered the matters without oral arguments,

IT IS ORDERED that plaintiff's motion to recuse this Court and the motion to reconsider dismissal of the action are denied.

cc: Counsel of record.

Initials of Deputy Clerk _____

OCT 23 1980

APPENDIX U

FILED
JUL 24 1984
CLERK, U.S. DISTICT COURT
CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

ROBERT A. BUSS, Plaintiff-Appellant v. WESTERN AIRLINES, INC., Defendant-Appellee	) CV 77-124-TJH)) 9th Cir.: 80-5818)) ORDER

This Court hereby issues the following clarification in regard to the above captioned matter:

This Court did not receive in evidence a tape recording of a June 18, 1980 pretrial conference meeting.

Further, the above mentioned tape was not taken into consideration in, and was unrelated to, the Court's decision to dismiss the case.

DATED: (7/24/84

/s/ Terry J. Hatter,Jr.
TERRY J. HATTER, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX V

FILED
JUL 26 1984
PHILLIP B.
WINBERRY
CLERK, U.S.
COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OBERT A. BUSS,	)
	) No. 80-5818
Plaintiff-Appellant,	)
	) D.C. No.
v.	) CV-124-TJH
	)
ESTERN AIRLINES, INC., a orporation,	) O P I N I O N
	)
Defendant-Appellee.	)

Appeal fromthe United States District ourt for the Central District of California erry J.Hatter, U.S. District Judge, Presiding
Argued and submited July 5, 1984

EFORE: GOODWIN and FARRIS, Circuit Judges, and ORRICK*, District Judge

ER CURIAM

Robert A. Buss ended nearly 35 years

f employment with Western Airlines on

Honorable William H. Orrick, Jr., United tates District Judge for the Northern Dis- rict of California, sitting by designation.

October 17, 1975 under circumstances which led him, in January, 1977, to file an action for damages for violating 29 U.S.C. § 621 et seq. (The Age Discrimination in Employment Act). In September, 1980, the district court dismissed the complaint because of plaintiff's failure to comply with court orders and failure to comply with local rules in a number of respects that delayed the preparation of the case for trial. Buss appeals, contending that the dismissal of the complaint without prejudice was an abuse of discretion in view of the running of the statute of limitations against his cause of action.

The voluminous file in this case reveals that a vast amount of lawyer time on both sides was expended in largely unnecessary paper shuffling as the parties battled over discovery and preliminary

matters. Plaintiff's counsel assigned most of the difficulty to her heavy caseload of other litigation and to the novelty of the issues in this case. The trial court record reveals, however, that a good deal of the difficulty was caused by intransigence and total unconcern for the local rules of court.

It is not the purpose of this decision to assess fault. The trial judge, however, was not at fault. A judge with a caseload to manage must depend upon counsel meeting each other and the court halfway in moving a case toward trial. Time and again, over a period of more than three years, plaintiff's counsel refused to tender to the defense a realistic draft of language to be included in the pretrial order. Counsel was warned by the court upon several occasions that further delay and refusal to

BEST AVAILABLE COPY

cooperate would result in the case being dismissed. The case is very similar to Von Poppenheim v. Portland Boxing & Wrestling Commission, 442 F.2d 1047 (9th Cir. 1971), cert. denied, 404 U.S. 1039 (1972).

The only point that keeps this appeal from being wholly frivolous is that the trial court dismissed the complaint at the end of a status conference instead of waiting another month until the final deadline for the pretrial order. Plaintiff understandably attempts to make the most of this event. However, counsel failed to show, even now, that she was making a good faith effort to tender a pretrial order on time. From the record in its entire context, it is clear that the district judge did not abuse his discretion. Indeed, the handling of the particular case by the district judge reveals far more patience

and forebearance than plaintiff's performance would have encountered in a number of other departments. The dismissal at the end of the status conference was entirely reasonable in light of the inability and unwillingness of counsel to offer any hope of moving affirmatively toward the filing of a pretrial order in the foreseeable future.

Affirmed.

APPENDIX W

F I L E D
SEPT 13 1984
PHILLIP B. WINBERRY
CLERK, U.S. COURT OF APPEALS

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT A. BUSS, Plaintiff-Appellant,	)	No. 80-5818
v.	)	ORDER
WESTERN AIRLINES, INC., a corporation, Defendant-Appellee.	)	

Before: GOODWIN and FARRIS, Circuit Judges, and ORRICK* District Judge

The appellant's petition for rehearing is denied.

*The Honorable William H. Orrick, Jr., United States District Judge for the Northern District of California, sitting by designation.

APPENDIX X

Article III of the United States Constitution provides:

"Article III, U.S. Constitution

Section 2, Clause 1. Subjects of jurisdiction.

"The judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority, --to all Cases affecting Ambassadors, other public Ministers and Consuls; --to all Cases of admiralty and maritime jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between citizens of different States;--between citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

APPENDIX Y

The Fifth Amendment, United States Constitution provides in relevant part, to-wit:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; . . ."

APPENDIX Z

The Seventh Amendment, United States Constitution provides:

"Trial by jury in civil cases.

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

APPENDIX AA

Federal Rules of Civil Procedure, Rule 16 provides:

"Rule 16. Pre-Trial Procedure; Formulating Issues

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions."

APPENDIX BB

Federal Rules of Civil Procedure, Rule 41(b) reads in pertinent part:

"Rule 41. Dismissal of Actions

. . .

(b) Involuntary Dismissal: Effect Thereof. For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim against him."

APPENDIX CC

Federal Rules of Civil Procedure, Rule 83 provides:

"Rule 83. Rules by District Courts

Each district court by action of a majority of the judges thereof may from time to time make and amend rules governing its practice not inconsistent with these rules. Copies of rules and amendments so made by any district court shall upon their promulgation be furnished to the Supreme Court of the United States. In all cases not provided for by rule, the district courts may regulate their practice in any manner not inconsistent with these rules."

APPENDIX DD

U.S. District Court for Central District of California, Local Civil Rule 9, in effect during 1980, prior to its 1983 amendment provides in pertinent part:

"Rule 9

. . .

(g) Pre-Trial Conference Order

Not later than 5:00 p.m., on the Wednesday prior to the pre-trial conference, plaintiff shall serve and lodge with the clerk a proposed Pre-Trial Conference Order, approved as to form and substance by the attorneys for all parties appearing in the case, and in form substantially as follows:"

APPENDIX EE

U.S. District Court for Central District of California, Local Civil Rule 9, put into effect during 1983, amending Local Rule 9 so as to distribute equal responsibility for preparation of a proposed pretrial order prvides in pertinent part:

". . .

> 9.8 PRE-TRIAL CONFERENCE ORDER A Pre-Trial Conference Order shall be prepared by plaintiff's counsel and signed by all counsel. It is the duty of all counsel to cooperate with plaintiff's counsel in the preparation and submission of the Pre-Trial Conference Order as required by this rule. Failure of counsel to comply shall subject counsel to the sanctions provided by the provisions of Local Rule 27 and 28 U.S.C.section 1927.

APPENDIX FF

U.S. District Court for Central District of California, current Local Rule 27.2 which was put into effect after the pendency of this matter, reads as follows:

". . .

27.2 PENALTY - FAILURE TO APPEAR OR PREPARE Failure of counsel for any party to take any of the following steps may be deemed an abandonment or failure to prosecute or defend diligently by the defaulting party:

(a) Complete the necessary preparation for pre-trial;

(b) Appear at pre-trial conference;

(c) Be prepared for trial on the date set; or

(d) Appear at any hearing where service of notice of the hearing has been given or waived.

Judgment may be entered against the defaulting party either with respect to a specific issue or on the entire case.

. . .

83.3"